87-1289

No. .....

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1987

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PATRICK HIGGINS,

Petitioner,

v.

CITY OF VALLEJO, a Muncipal Corporation;
ERROL COOLEY, an Individual,

Respondents.

o

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—AND APPENDIX—

o

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QUESTIONS PRESENTED

1. May a public employer lawfully select a candidate for promotion on the basis of race to eliminate a statistical disparity between the percentage of minorities in its municipal work force and the percentage in the city's general population?

2. May a city manager broadly construe the language of an affirmative action plan in order to justify a promotion based exclusively on race?

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OPINIONS BELOW

The opinion and order of which review is sought is reported as *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), appearing at pages 1c-20c of the Appendix. The denial of rehearing appears at page 1d of the Appendix. The judgment and order of the district court are unpublished, but are reproduced at pages 1a and 1b-99b of the Appendix.

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JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered judgment against Petitioner on July 29, 1987. Rehearing was sought but denied on September 28, 1987.

This Court's jurisdiction arises pursuant to 28 U.S.C. 1254(1) (1976) in that the decision of the Ninth Circuit creates a conflict in the decisional law of the circuits.

This Court's jurisdiction should also be invoked pursuant to Rule 17, Sections 1(a) and (c) of the Rules of the Supreme Court of the United States in that the Ninth Circuit Court of Appeals has decided important questions of federal law which have not previously been decided and should be decided by this Court and because the Ninth Circuit Court of Appeals has decided questions which are in conflict with decisions of this Court.

o

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case is based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (1982) and the Fourteenth Amendment to the United States Constitution.[1] Title VII states in applicable part:

> 2000e-2. Discrimination because of race, color, religion, sex, or national origin.
>
> (a) Employers. It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .
>
> 42 U.S.C. 2000e-2(a)(1) (1982).

[1] This case was pleaded and tried by general reference to Title VII, 42 U.S.C. 2000e *et seq.* (1982) and the Fourteenth Amendment to the United States Constitution. For the convenience of the Court, only one pertinent section of each provision is reproduced herein.

The Fourteenth Amendment to the United States Constitution states in applicable part:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the application of Vallejo City Charter Sections 800, 803(a) and 803(b); City of Vallejo Ordinance No. 138 N.C. (2d), dated February 26, 1973; Ordinance No. 667 N.C. (2d) (the Affirmative Action Policy), dated September 27, 1982; and City of Vallejo Resolution No. 82-415N2, dated July 6, 1982. The pertinent text of said Charter, resolution and ordinances are contained in Appendix Sections e, f, g, h and i to this Petition.

STATEMENT OF THE CASE

I. Facts And Background

Petitioner Patrick Higgins was denied a promotion solely on account of his race purportedly pursuant to an affirmative action plan voluntarily adopted by Respondent City of Vallejo ("City"). The plan, which covered all phases of City employment, consisted of an ordinance passed in 1973, a resolution passed in July 1982 and another ordinance passed in September 1982. The plan was adopted to remedy a statistical imbalance in that the City's work force contained a lower percentage of minorities than the City's general population. The plan contained no quotas. Instead, the plan required that all promotions be made on the basis of competitive examination or demonstrated merit. The plan specifically prohibited the use of race as a consideration in the promotion process. [App. 8c, 2g, 5h.] However, a resolution enacted prior to the enactment of the 1982 plan recognized as a goal that the City's work force should be consistent with the racial or ethnic composition of the City as

established by the 1980 Census for the City of Vallejo. No termination date was established, but a timetable called for implementation as soon as possible.

Higgins is a white male who had been employed by the City of Vallejo as a Firefighter. After serving a three year apprenticeship as an entry level Firefighter, Higgins applied for a promotion to the Firefighter/Engineer position. He participated in the examination process composed of one competitive written examination and three practical examinations. The written tests were validated by the State of California Cooperative Personnel Services to ensure they address affirmative action issues. The scores of all applicants were weighted and a rank order promotional list was prepared. [App. 4c.]

At the time a Firefighter/Engineer position became available, Higgins ranked first and Errol Cooley, a black male, ranked third. The Chief of the Fire Department strongly recommended the promotion of Higgins on the basis of his demonstrated performance during the examination process and on the basis of overall merit which Higgins demonstrated while working as a Firefighter in the Vallejo Fire Department. Instead of following the Chief's recommendation, the City Manager selected Cooley for promotion. The City Manager had not interviewed any of the candidates. Instead, he advised the Fire Chief that Cooley would be appointed for affirmative action reasons because Cooley was black and he was "reachable." [App. 4c, 5c.]

Following Cooley's promotion, the Vallejo Firefighters Union, Local 1186, AFL-CIO, filed a grievance on behalf of Higgins alleging a violation of the collective bargaining agreement between the Union and the City. After an unfavorable ruling, Higgins filed an action in district court alleging violations of local law, Title VII, and the California and United States Constitutions. [App. 5c.] The district court exercised jurisdiction over the federal claims by virtue of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. 2000e-5, the Civil Rights Act of 1866 and 1821, 42 U.S.C. 1981 and 42 U.S.C. 1983, respectively, the Fourteenth Amendment to the United States Constitution (28 U.S.C. 1343(3) and (4); 28 U.S.C. 1331) and over the pendent state claim by virtue of Rule 18(a) of the Federal Rules of Civil Procedure.

II. Decisions Below

Both parties filed motions for summary judgment. The Federal District Court for the Northern District of California granted defendants' Motion For Summary Judgment on the ground that the promotion of Cooley was consistent with local laws, federal statutes and the State and Federal Constitutions. [App. 5c.] Higgins appealed on all issues, save the State constitutional issue, and the Ninth Circuit Court of Appeals affirmed the judgment of the district court.

The Ninth Circuit Court held that consideration of race was justified as a response to a manifest imbalance evinced by the underrepresentation of minorities in the City's employ. [App. 13c.] The Ninth Circuit also held that the affirmative action plan passed the strict scrutiny standard, a standard requiring a showing of more than general societal discrimination, as "the record provides abundant evidence that the City of Vallejo engaged in past discrimination." [App. 16c.]

———— o ————

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH PRECEDENT ESTABLISHED BY THIS COURT.

A. The Ninth Circuit's Decision Directly Conflicts With This Court's Decision In *Johnson v. Transportation Agency.*

The Ninth Circuit in *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), establishes the principle that a public employer may make race based employment decisions for all phases and classifications of city employment, under the auspices of an affirmative action plan, if a numerical disparity is disclosed by a comparison of the percentage of minorities in the city's municipal work force with the percentage in the city's general population. The Court found the necessary predicate of discrimination—the manifest imbalance—to be demonstrated by (1) a 1973 report of minority and black populations within the City and its work force and (2) unanalyzed data regarding the number of blacks hired or promoted in the City's Fire Department [App. 11c, 12c].

According to the Ninth Circuit, the general statistical disparity evidence along with the raw numerical data justified the City in establishing an affirmative action plan to remedy discrimination, in both hiring and promotion in the City's Fire Department. This rule of law directly conflicts with this Court's decision in *Johnson v. Transportation Agency*, 107 S.Ct. 1442 (1987). *Johnson* set forth the standard for determining whether the requisite "manifest imbalance" exists that would justify consideration of race or sex of applicants in its employment decisions:

> . . . a comparison of the percentage of minorities in the employer's work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise (citations omitted). Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications (citations omitted). *Id.* at 1452.

Applying these standards to the facts before it, the *Johnson* Court concluded that the "manifest imbalance" predicate was clearly shown in the job classification at issue. The Court stated that women were "egregiously underrepresented," and that *none* of the 238 positions were occupied by a woman. *Id.* at 1454 (emphasis in original).

In Higgins, the Court failed to apply the *Johnson* standards to the facts. No analysis was undertaken to determine either the relevant area labor market[2] or the labor force in possession of the relevant qualifications. As a result, no statistical data on minority and non-minority percentages was available for comparison.

To make its determination as to whether a statistical imbalance existed such that race could be considered in the Fire Department promotions, the Ninth Circuit relied upon the following data:

> In 1973 the City of Vallejo population was 30% minority (17% black).
>
> In 1973 the City of Vallejo municipal work force was 11.4% minority (7.3% black).
>
> Between 1964 and 1973, 2 blacks received Fire Department jobs.
>
> Between 1972 and 1983, of 47 Firefighters hired, 5 (10.6%) were black.
>
> 1 of 36 Fire Captains was black.
>
> 3 blacks received promotions to Firefighter/Engineer. [App. 11c-12c.]

No comparisons were made of the percentage of minorities in the Fire Department with the percentage in the relevant labor force; indeed the statistical imbalance was found without reference to the

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[2] Applying the *Johnson* standards to determine whether an imbalance existed in the District of Columbia Fire Department, the Court in *Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987), found that *Johnson* required a comparison between the percentage of blacks in the fire department with the percentage of blacks in the labor market. The Court determined the relevant labor market to consist of persons 20 to 28 years of age in the Washington Metropolitan Area, not just within the confines of the nation's capital, as approximately half the entry level firefighters hailed from the suburbs.

relevant labor market. Accordingly, the decision is in direct conflict with the teachings of *Johnson*.

B. The Ninth Circuit's Decision Directly Conflicts With This Court's Decision In *United Steelworkers of America v. Weber*.

In *United Steelworkers of America v. Weber*, 442 U.S. 193 (1979), this Court set forth the standard for voluntary affirmative action plans. The voluntary affirmative action plan upheld was based upon discrimination so egregious that the Court could take judicial notice of racial exclusion. *Id.* at 199. This Court held that the plan was "designed to break down old patterns of racial segregation and hierarchy" (*Id.* at 208); did not unnecessarily trammel the interests of the white employees, and would end when the existing exclusion of minorities was remedied.

None of these predicates exist here. The evidence relied upon does not show evidence of discrimination in the relevant job classifications. The plan is based on an irrelevant statistical disparity between the minority municipal work force and the City's minority population. Other evidence relied upon by the Court demonstrates that the Fire Department hires black Firefighters at a rate in excess of their proportion in the municipal work force. The plan is not intended to break down traditional patterns of racial segregation and hierarchy because no acts of exclusion have ever been shown to have occurred. The plan establishes an arbitrary end date in that although the City population is not the relevant labor pool, the plan is intended to continue until the percentage of minorities in the municipal work force compares favorably with the City's minority population. The plan unnecessarily trammels the interests of white employees in that the plan had not been shown to effect some remedial purpose.

C. The Ninth Circuit's Decision Directly Conflicts With This Court's Decision In *Wygant v. Jackson Bd. of Education*.

In *Wygant v. Jackson Bd. of Education*, 106 S.Ct. 1842, 1847-48 (1986), this Court has held that under the equal protection clause, racial classification cannot be justified by a pursuit of racial balance

or of proportional representation. *Wygant* held that constitutional law required that public employers must ensure that before they embark on affirmative action plans, they have *convincing* evidence that remedial action is warranted, that is, there must exist sufficient evidence to justify the conclusion that there has been prior discrimination. (*Ibid.*)

To find the requisite proof of prior discrimination, the Ninth Circuit in *Higgins* refers to the evidence indicated in the Title VII discussion. [App. 16c.] As discussed herein, the sparse data relied upon is merely some evidence of general societal discrimination which, without more, is too amorphous a basis for imposing a racially classified remedy. *Wygant v. Jackson Bd. of Education, supra*, 106 S.Ct. 1842.

II. THE CITY MANAGER OF THE CITY OF VALLEJO ACTED UNLAWFULLY IN USING RACE AS A PROMOTIONAL CONSIDERATION IN THE APPOINTMENT OF ERROL COOLEY.

Unlike the affirmative action plan adopted by the County of Santa Clara in *Johnson*, the City of Vallejo ordinances prohibit the use of race as a promotional selection criterion. Also unlike the Santa Clara County Agency's Director James Graebner, who testified that he looked at all of Diane Joyce's overall qualifications carefully while comparing her to Paul Johnson, the City Manager in the City of Vallejo ignored the overall qualifications of Higgins to reach a qualified black Firefighter.

No evidence was ever presented to the district court in the proceedings below to show that the overall hiring goals could not be met without ignoring clear and specific ordinance prohibitions against the use of race as promotional consideration. The ordinances, however, adopted comprehensive counselling, recruiting and training programs targeted to achieving racial balance. No evidence was presented to the district court to show that these programs could not be effectively utilized.

Unlike *Johnson*, blacks have been promoted to supervisory and management positions in the City of Vallejo Fire Department. Indeed, the City submitted a declaration to the district court that was signed by a black Battalion Chief. Like the District of Columbia in

Hammon v. Barry, supra, the City of Vallejo has failed to demonstrate the predicate of discrimination in the Vallejo Fire Department sufficient to justify a radical revolution in the law of Title VII and the equal protection clause of the Fourteenth Amendment.

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CONCLUSION

Questions as to the lawful formulation and operation of affirmative action programs are involved herein. There is a clear and present need for this Court's guidance as to when an employer is permitted pursuant to an affirmative action plan to take race into account in employment decisions. As the plans of both public and private employers are faced with the question of validity, the outcome affects the national work force. The Court should grant this Petition for Certiorari and resolve the confusion which exists.

Dated: December 23, 1987

Respectfully submitted,

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By Alan C. Davis
Attorneys for Petitioner

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

---oOo---

PATRICK HIGGINS, Plaintiff, vs. CITY OF VALLEJO, A MUNICIPAL CORPORATION AND ERROL COOLEY, AN INDIVIDUAL, Defendants.	CIVIL NO. S-85-0060 MLS JUDGMENT IN A CIVIL CASE (March 14, 1986) Judge Milton L. Schwartz

DECISION BY COURT. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that

judgment be and hereby is entered in favor of defendants.

March 14, 1986

JAMES R. GRINDSTAFF
Clerk

/s/
S. Sinander
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

---oOo---

PATRICK HIGGINS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL NO.
	)	S-85-0060 MLS
CITY OF VALLEJO, A MUNICIPAL CORPORATION AND ERROL COOLEY, AN INDIVIDUAL,	)	
	)	
Defendants.	)	
	)	

O R D E R

On October 4, 1985, the court heard the following motions: (1) Plaintiff's motion for partial summary judgment; (2) Defendants' motion for summary judgment; and (3) Plaintiff's motion to strike portions of affidavits submitted in support of defendants' motion for summary

judgment. At the close of the parties' arguments, the court took the motions under submission.

The following constitutes the court's decision on those motions.

I. BACKGROUND

This is a reverse discrimination case. Plaintiff is a white firefighter who was passed over for a promotion in favor of a black firefighter (defendant Errol Cooley) in the Vallejo City Fire Department.

In December of 1983, a "firefighter/ engineer" position opened up in the Vallejo City Fire Department. Eligibility for the position was based on competitve exam scores: only those with the top three exam scores were eligible to be promoted. At the time the position opened up, plaintiff had the top exam score (94.17). However, defendant Cooley was also eligible for the promotion since

he had the third highest score (93.09). Only 1.08 points separated their scores.

The department's fire chief recommended plaintiff for the promotion. Instead of following this recommendation, the city manager appointed defendant Cooley. The city manager indicated that defendant's promotion was more consistent with the city's affirmative action plan (AAP).

Vallejo is an ethnically diverse community. According to the 1980 cesus, 60 percent of the city is white, 18.75 percent is black, 10 percent is Hispanic, 11 percent is Asian and approximately .25 percent is of other ethnic heritage. When the city made its decision to promote Mr. Cooley, only three of 80 uniformed members of the fire department (3.8 percent) were black. No blacks occupied the position of firefighter/ engineer at the time Mr. Cooley was

promoted; in fact, only two other blacks had ever held the position during the department's history.

Plaintiff, a white male, alleges that Mr. Cooley's promotion violates plaintiff's rights under (1) Vallejo's city charter and local law; (2) the fourteenth amendment of the United States Constitution and the Civil Rights Act of 1866 and 1871, 42 U.S.C. §1981 and 42 U.S.C. §1983, respectively; (3) Title VII of the Civil Rights Act of 1964, 42 U.S.C §2000e-2(a)(1), 2(a)(2); (4) Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d; (5) Article 1, Section 7 of the California Constitution; and (6) Article 1, Section 8 of the California Constitution.

II. THE CROSS MOTIONS FOR SUMMARY JUDGMENT

Plaintiff and defendant have both moved for summary judgment on all of

plaintiff's claims.[1/]

A. SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure indicates that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Aydin Corp. v. Loral Corp., 718 F.2d 897, 901-02 (9th Cir. 1983). The purpose of summary judgment is to avoid a useless trial. Turner v. Local Union No. 302, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 604 F.2d 1219, 1228 (9th Cir. 1979) (trial must not be a "useless formality"). A court may properly resolve questions of law on summary judgment. Fonda v. Gray, 707 F.2d 435, 438 (9th Cir. 1983). A court may also grant summary judgment if

1/ Plaintiff's motion is "partial" in that it leaves the issue of damages for trial.

either party is unable to muster factual support to substantiate its position.

Most, if not all, of the issues raised by this case are issues of law which the court would be responsible for resolving at trial. As plaintiff observes, "the validity and meaning of the affirmative action plan . . . is ultimately a legal question." Plaintiff's Opposition to Defendants' Motion For Summary Judgment, at 8, lines 12-13.

As for plaintiff's claims under local law, the construction of a local statute or ordinance is a question of law under California law, Aptos Seascape Corp. v. County of Santa Cruz, 138 Cal. App. 3d 484, 498, 188 Cal. Rptr. 191, 198 (1982); Killian v. City and County of San Francisco, 77 Cal. App. 3d 1, 7, 143 Cal. Rptr. 430, 433 (1978); Teacher's Management Investment Corp. v. City of

Santa Cruz, 64 Cal. App. 3d 438, 448, 134 Cal. Rptr. 523, 529 (1976); County of Madera v. Superior Court of Madera County, 39 Cal. App. 3d 665, 675 n.7, 114 Cal. Rptr. 283, 289 n. 7 (1974); National Exhibition Co. v. City and County of San Francisco, 24 Cal. App. 3d 1, 10, 100 Cal. Rptr. 757, 762 (1972), as well as federal law. Bingham's Trust v. Commissioner of Internal Revenue, 325 U.S. 365, 370 (1945); U.S. v. Horowitz, 765 F.2d 1400, 1403 (9th Cir.), cert. denied, 106 S.Ct. 74 (1985); U.S. v. Louisiana-Pacific Corp., 754 F.2d 1445, 1447 (9th Cir. 1985); International Society for Krishna Consciousness v. Rochford, 425 F.Supp. 734, 738 (N.D. Ill. 1977), rev'd on other grounds, 585 F.2d 263 (7th Cir. 1978). Thus the issue is an appropriate one to dispose of on summary judgment. International Society for Krishna Consciousness, 425 F.Supp. at

738 (citing Gray Line Inc. v. Gray Line Sightseeing Companies Associated, Inc., 264 F.Supp. 495, 501 (N.D. Cal. 1965)). Teacher's Management Investment Corp., 64 Cal. App. 3d at 448, 134 Cal. Rptr. at 529 (when "the meaning of an ordinance is a matter for judicial interpretation, nothing is gained by going to trial on the issue."); National Exhibition Co., 24 Cal. App. 3d at 7, 100 Cal. Rptr. at 760 ("summary judgment is appropriate when there is no dispute as to fact, but rather the legal effect of those facts and as to the interpretation of various documents before the court."), Wright, Miller and Kane, Federal Practice and Procedure: Civil 2d, §2725, p. 79-82.

In the Title VII and section 1981 context, the issue of the validity of an affirmative action plan is one for the court and not for the jury; if the court finds that the plan has a remedial

purpose and reasonable goals, the employer is entitled to summary judgment. Setser v. Novack, 657 F.2d 962, 969-70 (8th Cir.), cert. denied, 454 U.S. 1064 (1981). Summary judgment is inappropriate if there is a genuine issue as to whether plaintiff's treatment was related to the plan. Id. at 970.

Similarly, the constitutional validity of an affirmative action plan or its validity under Title VI is a question of law for the court and not the jury. Bratton v. City of Detroit, 704 F.2d 878, 884 (6th Cir.), on reh'g, 712 F.2d 222 (1983), cert. denied, 464 U.S. 1040, reh'g denied, 465 U.S. 1074 (1984) (citing Setser, 657 F.2d at 969-70). Janowiak v. Corporate City of South Bend, 750 F.2d 557 (7th Cir. 1984). Even though it involved a reversal of a summary judgment order, Janowiak does not indicate a different result. Janowiak

simply indicates that a district court, on the basis of statistical disparities between the work force and population in general, could not find the requisite "substantial government interest" required to justify the affirmative action plan. Id. at 563-64. This leaves open the possibility of granting summary judgment when the moving party shows more than statistical disparities (i.e., a finding of past discrimination). Id.

Of course, an analysis of whether an affirmative action plan is permissible may involve the evaluation of factual materials, as it does in this case. In this regard, the court notes that the burden of showing the absence of a genuine issue of fact is on the moving party. International Union of Bricklayers & Allied Craftsmen Local Union No. 20, AFL-CIO, v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir.

1985). However, once that burden is met, the burden then shifts to the opponent of the motion to set forth specific facts indicating that there is a genuine issue for trial. Federal Rule of Civil Procedure 56(e); Lowe v. City of Monrovia, 775 F.2d 998, 1008 (9th Cir. 1985); Union of Bricklayers, 752 F.2d at 1405; Turner, 604 F.2d at 1228. A party opposing summary judgment must therefore present some significant probative evidence to support his position. Compton v. Ide, 732 F.2d 1429, 1434 (9th Cir. 1984); Ruffin v. Los Angeles County, 607 F.2d 1276, 1280 (9th Cir. 1979), cert. denied, 445 U.S. 951 (1980).

The amount of evidence necessary to raise a genuine issue of material fact is that amount sufficient to require a judge or jury to resolve the parties' differing versions of the truth at trial. Aydin, 718 F.2d 901-02 (citing First National

Bank v. Cities Service Co., 391 U.S. 253, 288-89 (1968)). A mere scintilla of evidence is not sufficient to raise a triable issue of fact; a fact finder is entitled to draw only reasonable inferences from the evidence produced. British Airways Board v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978), cert. denied, 440 U.S. 981, reh'g denied, 441 U.S. 968 (1979).

The nature and quality of the evidence produced is also significant. Unsubstantiated and conclusory allegations are insufficient to oppose summary judgment. Preston v. Heckler, 734 F.2d 1359, 1373 (9th Cir. 1982); Mitchel v. General Electric Co., 689 F.2d 877, 879 (9th Cir. 1982). In the civil rights context, for example, mere assertions of discriminatory motive and intent are inadequate. Foster v. Arcata Associates, 772 F.2d 1453, 1459 (9th Cir. 1985).

Of course, once adequate evidence is produced, the court is usually not permitted to weigh the evidence, pass upon its credibility or speculate as to the ultimate findings of fact which would be found at trial. Arosen v. Crown Zellerbach, 662 F.2d 584, 591 (9th Cir. 1981), cert. denied, 459 U.S. 1200 (1983). In considering a motion for summary judgment, the district court is not to try issues of fact or resolve them in favor of one party or another, but may only determine whether a party has produced evidence sufficient to support a reasonable inference of the existence of the fact at issue. Foster, 772 F.2d at 1459.

B. PLAINTIFF'S CLAIMS UNDER LOCAL LAW AND THE CITY CHARTER

Much of plaintiff's argument centers on his contention that the city's promotion of Mr. Cooley was improper

under local law. Plaintiff argues the city's action was impermissible for two reasons. First, he contends that Vallejo's affirmative action plan does not authorize minority preferences in hiring or promotion decisions. Second, he argues that even if minority preferences are allowed under the affirmative action plan, they are not allowed under the terms of the city charter. Since the content and validity of the city's affirmative action plan is central to any federal law analysis, the court must address these issues first.

1. The Content of the City's Affirmative Action Plan

One of the key issues in this case is whether the city's affirmative action plan actually does authorize the city to use race as a factor in promotion and hiring decisions. This issue turns on whether the city's "affirmative action

plan" consists of only the ordinance entitled "Affirmative Action Employment Policy," adopted on September 27, 1982, or whether the plan also includes a resolution adopted by the city council two months earlier on July 6, 1982. The resolution provides the strongest support for the city's action in promoting Mr. Cooley in that it commits the city to hire and promote minorities in proportions that exceed minorities' proportions in the city's population. See Resolution No. 82-415 N.C., Affidavit of Donald B. Cardno in Support for Summary Judgment (hereafter cited as "Cardno Affidavit"), Exhibit M.[2/]

Plaintiff first argues that the

2/ Both plaintiff and defendants have supplied the court with various city documents. Where the exhibits duplicate each other, the court will refer to defendants' exhibits, since defendants make the more complete presentation of documents.

resolution should not be considered part of the city's affirmative action plan because resolutions do not "have the force" of an ordinance. Plaintiff argues that the resolutions are merely "expressions of opinion" and have a "temporary character." See Reply to Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Partial Summary Judgment, p. 6, citing 45 Cal. Jur. 3d "Municipalities" §188 at 302. A check of plaintiff's source reveals that both California Jurisprudence and the case authority on which its comments are based say much more. Both say that strictly speaking, there is a difference beteween an ordinance and a resolution. But each goes on to say that "for many purposes," the two are equivalent terms. See 45 Cal. Jur. 3d "Municipalities" §188 at 303; Central Manufacturing District v.

Board of Supervisors of Los Angeles County, 176 Cal. App. 2d 850, 860, 1 Cal. Rptr. 733, 739 (1960).

In fact, the court in Central Manufacturing District went on to note that:

> But in the absence of statutory or charter provisions to the contrary, a legislative act may be either in the form of a resolution or of an ordinance. [Citations] For many purposes resolutions and ordinances are equivalent terms. [Citations] "And it has been held that even where the statute or municipal charter requires the municipality to act by ordinance, if a resolution is passed in the manner and with the statutory formality required in the enactment of an ordinance, it will be binding and effective as an ordinance." [Citations]

176 Cal. App. 2d at 860, 1 Cal. Rptr. at 739 (citing generally, Crowe v. Boyle, 184 Cal. 117, 149, 193 P. 111, 124 (1920).

Section 803 of the Vallejo City Charter does require the city council to provide "by ordinance" for "a modern system of personnel administration."

Cardno Affidavit, Exhibit A. However section 312 of the charter establishes the same procedural formalities for adopting both ordinances and resolutions. Id. Plaintiff has not argued that the resolution was adopted improperly.

Thus, the fact that an earlier legislative act was adopted by resolution rather than by ordinance does not by itself determine the relationship of one to the other. The issue becomes whether the September ordinance repealed the July resolution, or whether the two were intended to coexist.

If the ordinance repealed the resolution, the repeal would have had to be by implication. The ordinance made no mention of its effect on the resolution, even though the ordinance did expressly repeal an earlier ordinance addressing affirmative action. See Cardno

Affidavit, Exhibit J, §1.

Repeals by implication are disfavored under both federal and California law. Watt v. Alaska, 451 U.S. 259, 267 (1981); U.S. v. Will, 449 U.S. 200, 222 (1980); People v. Jacobs, 158 Cal. App. 3d 740, 751, 204 Cal. Rptr. 849, 857 (1984); Fillmore v. Irvine, 146 Cal. App. 3d 649, 657, 194 Cal. Rptr. 319, 325 (1983). Courts will only find that a later act impliedly repeals an earlier act if the two acts are so inconsistent with each other that the two laws cannot sensibly coexist. Watt, 451 U.S. at 267; Iscoff v. Police Commission of City and County of San Francisco, 222 Cal. App. 2d 395, 409, 35 Cal. Rptr. 189, 198 (1963). As a general rule, statutes should be read in a way that gives effect to each statute; there is no implied repeal unless the legislative body's intent to repeal is clear. Watt, 451 U.S. at 267.

The substantive provisions of the ordinance and the resolution are not inherently conflicting; the ordinance generally reestablishes the city's commitment to affirmative action and identifies various entities' responsibilities in implementing the goals established by the affirmative action program. Cardno Affidavit, Exhibit J. The resolution also proclaims the city's commitment to affirmative action, and establishes a policy of hiring and promoting minorities at rates in excess of minorities' proportions in the city's population. While the resolution is <u>different</u> from the ordinance in that it establishes a specific means of achieving affirmative action goals, the two are in no way inconsistent in that both policies can coexist peacefully. Indeed, the two appear quite complementary. It should also be noted that both the ordinance and

the resolution advert to the merit principles underlying all city personnel practices. Hence the two cannot be said to be inconsistent in that respect.

Finally, legislative history evidence exists which indicates that the city council actually intended the resolution and ordinance to work in tandem. The personnel director explicitly referred to the resolution when the city council discussed the ordinance's adoption. See Cardno Affidavit, Exhibit Z, pp. 6-7. The personnel director reported that the ordinance was "the final in a series of revised documents" designed to carry out the city's affirmative action responsibilities. Id. at 6 (emphasis added). The director also described the ordinance as "delineat[ing] the responsibilities of the various parties within the city" for carrying out earlier affirmative action

policies adopted by the city council. Id. Finally, the director specifically referred to the resolution's provisions for hiring minorities in proportions in excess of those in the local population when a council member expressed concern about the ordinance's lack of specific timetables for achieving affirmative action goals. Id. At no point during the rather extended discussion of the ordinance did anyone, on either the city council or in the audience, suggest that the ordinance supplanted rather than supplemented the earlier resolution.[3/] In fact, all the available evidence suggests that the ordinance was intended to supplement the resolution.

3/ There is some ambiguity about which resolution the personnel director was referring to since he referred to the "June" resolution providing for extra-proportional hiring and the ordinance was actually adopted in early July. But since the substance of the two resolutions seems to be the same and the timing

(footnote cont'd next page)

This being the case, this court concludes that Vallejo's "affirmative action plan" includes both the ordinance passed in September of 1982 and the resolution passed two months earlier in July.

Plaintiff argues that even if this resolution is considered part of Vallejo's affirmative action plan, it does not by its terms authorize racial preferences. While the resolution does not speak in terms of "racial preferences," the only reasonable inference this court can draw from this language is that the city council did intend that race would be taken into consideration in hiring and promotion decisions. The theory behind extra-proportional hiring is that under a system without racial preferences, the

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(fn. 3 cont'd)
is very close, this court assumes that the "June Resolution" referred to in the minutes is really the resolution actually passed in July.

law of averages would have minorities being hired and promoted at a rate equal to their proportion in the population. A system employing extra-proportional hiring almost necessarily requires that hiring and promotion not be left to the law of averages, but instead, the city will take a more aggressive approach and give some consideration to race when making personnel decisions.

Of course, the training and recruitment programs established in the subsequent affirmative action ordinance could, if successful, result in minorities being hired in excess of their proportion of the population. However the reference to "extra-proportional hiring" is separate and independent from the reference to training programs. Reading the two references as meaning the same thing would, in effect, render the reference to extra-proportional hiring

surplusage, in contradiction of established principles of statutory construction. U.S. v. Handy, 761 F.2d 1279, 1280 (9th Cir. 1985). Moreover, it would be especially inappropriate when, as in this case, the language was specifically inserted at the suggestion of the U.S. Department of Housing and Urban Development (HUD). See Cardno Affidavit, Exhibit X, p. 7. The court can only infer that HUD suggested the language because it added something to the city's affirmative action plan.

Therefore, the court concludes that the resolution's authorization of "extra-proportional hiring" means that the city may give some consideration to a person's race in hiring and promotion decisions. Consequently, the city's decision to consider race in promoting Mr. Cooley instead of plaintiff was a decision made pursuant to the city's

affirmative action policy.

2. The Compatibility of the Affirmative Action Plan with the City Charter

Plaintiff also argues that any consideration of race -- even in an affirmative action context -- violates city charter sections providing for a "merit system" of personnel administration. Specifically, plaintiff cites the following section of the city charter:

> Section 803, Personnel Ordinance.
>
> The City Council shall by ordinance provide a modern system of personnel administration, including but not limited to provisions for:
>
> a. an orderly system of positive recruiting and competitive examinations for entrance to the civil service, free of all political, religious, racial and other considerations not consistent with the merit principle, and properly advertised;
>
> b. a system for promotions within the service based on competitive examinations or

demonstrated merit as shown by records of performance and seniority, or some combination thereof;

c. appointment from among the candidates on the eligible lists; . . .

See Cardno Affidavit, Exhibit A, pp. 29-30. Plaintiff also cites section 800 of the city charter, which requires that promotions be based on "ability and experience." However, plaintiff neglects to include the rest of the section, which subjects the determination of ability and experience "to such more specific standards as set forth in personnel rules as adopted under provisions of Section 803" of the city charter. Accordingly, this court will focus on whether Vallejo's affirmative action policy fell within the city's powers under section 803.

Plaintiff's argument requires that this court interpret the meaning of the city charter's provisions. The wording

of the charter is such that it could be susceptible to several interpretations.[4/] However, such an exercise is a legal one, not a fact finding one. Accordingly, the validity of Vallejo's affirmative action plan under the city charter is another issue which can be appropriately disposed of on summary judgment.

4/ The usual rule for statutory interpretation is that where a statute is unclear with respect to a certain issue, there is room for statutory interpretation. Otherwise the statute's clear directive controls. See People of the State of Cal. ex rel. Van de Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1308, 1313 (9th Cir. 1985). See also Swift v. County of Placer, 153 Cal. App. 3d 209, 213, 200 Cal. Rptr. 181, 184 (1984); Golden v. City of Oakland, 49 Cal. App. 3d 284, 288, 122 Cal. Rptr. 400, 401 (1975); Welshans v. City of Santa Barbara, 205 Cal. App. 2d 304, 308, 23 Cal. Rptr. 108, 111 (1962). Here there is a sufficient lack of clarity as to what constitutes "merit" and the charter's applicability to the facts of this case to warrant the court's inquiry into what the charter truly proscribes.

Plaintiff first argues that the charter bars all consideration of race in city employment. A highly technical reading of the charter might support such an interpretation, but if so, only with respect to entrance into the civil service. See id. §301(a). More significantly, both federal and state courts have interpreted laws proscribing discrimination as nonetheless allowing some forms of affirmative action programs. The theory underlying such interpretations is that anti-discrimination laws are designed to remedy the effects of majority discrimination against minorities.[5/]

5/ The Supreme Court's observations in United Steelworkers v. Weber are illustrative: "it would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' . . . constituted the

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Furthermore, principles of statutory construction require this court to look at the provisions of the city charter as a whole. Don't Tear It Down, Inc. v. Pennsylvania Ave. Development Corp., 642 F.2d 527, 533 (D.C. Cir. 1980); Ideal Farms, Inc. v. Benson, 288 F.2d 608, 613 (3d Cir.), cert. denied, 372 U.S. 965 (1961); see also People v. Trantham, 161 Cal. App. 3d Supp. 1, 8, 208 Cal. Rptr. 535, 538 (1984); Aptos Seascape Corp. v. County of Santa Cruz, 138 Cal. App. 3d at 497, 188 Cal. Rptr. at 199; Killian v.

(fn. 5 cont'd)
first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." 443 U.S. 193, 204 (1979). Weber held that Title VII's literal proscription against discrimination because of race should not be interpreted to forbidracial preferences. The Court expressly noted that "[i]t is a 'familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers,'" Id. at 201.

City and County of San Francisco, 77 Cal. App. 3d 1, 7-8, 143 Cal. Rptr. 430, 433-34 (1978); Golden, 49 Cal. App. 3d at 288, 122 Cal. Rptr. at 402; Universal Consolidated Oil Co. v. City of Los Angeles, 202 Cal. App. 2d 771, 777, 21 Cal. Rptr. 61, 65 (1962). In fact, California courts have said the following about interpreting city charters:

> The fundamental rules of statutory construction apply to interpret Charter provisions. [Citations] First, "the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." [Citations] Secondly, the provision must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity. [Citations] Significance, if possible, should be attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose, as "the various parts of a statutory enactment must be

> harmonized by considering the particular clause or section in the context of the statutory framework as a whole." [Citations] "'The court should take into account matters such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy and contemporaneous construction.'" [Citations]

147 Cal. App. 3d at 17-18, 194 Cal. Rptr. at 725-26. The court goes on to conclude that the construction of a statute by officials charged with its administration is also entitled to consideration. Id.; see also Reid v. Egan, 765 F.2d 1457 (9th Cir. 1985); Pierce County v. U.S. By and Through Department of Labor, 759 F.2d 1398, 1401 (9th Cir.), cert. denied, 106 S.Ct. 308 (1985).

Finally, there is a very strong presumption of validity for municipal laws. City of Industry v. Willey, 11 Cal. App. 3d 658, 663, 89 Cal. Rptr. 922, 924 (1970). For example, the court in

Galligan v. City of San Bruno indicated that

> the presumption is that the enactment is valid. [Citations] "'. . . "Where ordinances or bylaws have been enacted pursuant to competent authority they will be supported by every reasonable intendment and reasonable doubts as to their validity will be resolved in their favor. Courts are bound to uphold municipal ordinances unless they manifestly transcend the powers of the enacting body."'"

132 Cal. App. 3d 869, 873, 183 Cal. Rptr. 466, 468 (1982). According to the court in DeYoung

> "[t]he charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation. [Citations] . . . All rules of statutory construction as applied to charter provisions [Citations] are subordinate to this controlling principle . . . A construction in favor of the power and against the existence of any limitation or restriction thereon which is not expressly stated in the charter is clearly indicated . . . Thus in construing the

> city's charter a restriction on the exercise of municipal power may not be implied." [Citations]

DeYoung v. City of San Diego, 147 Cal. App. 3d 11, 17, 194 Cal. Rptr. 722, 725 (1983), citing Grimm v. City of San Diego, 94 Cal. App. 3d 33, 37, 156 Cal. Rptr. 240 (1979). All of this creates a very heavy burden for plaintiff in showing that the city's affirmative action plan conflicts with Vallejo's city charter.

With these principles in mind, the city charter must be interpreted as requiring that the city council establish a system of personnel administration based on merit. But the fact that the system must be "based on" merit and competitive examinations does not necessarily exclude consideration of other factors. In fact, the city charter itself says that the city council shall provide for a system of personnel

administration which includes, but is "not necessarily limited to" hiring and promotion of persons based on the factors indicated. (Emphasis added.)

This is not to suggest that the city charter places no limits on the kind of personnel system the city council may adopt. The charter's language is clear that factors which are "not consistent with" the merit principle should not be employed in personnel decisions, at least at the entry level. However this does not preclude consideration of additional factors, which the city finds to be "consistent with" the merit principle.

An example is the city's civil service regulations providing for various kinds of "veterans' preferences." See Cardno Affidavit, Exhibit B, pp. 54-56. Consideration of military service is not inconsistent with a merit system, particularly when the preference is not

absolute. Applicants still "compete" for jobs and promotions. Veterans must still obtain a certain score on competitive exams; however, once the veteran obtains that score the veteran is entitled to additional points which may or may not give the veteran a competitive advantage in actually obtaining the position in question.

The same can be said of the operation of the city's affirmative action policy in this case. Mr. Cooley "competed" for the promotion; he was not even considered for the promotion until his relative test score placed him on the list of eligibles as required by the city charter. Only 1.08 points on a one hundred point scale separated Mr. Cooley's score from plaintiff's. Cf. Dougherty v. Barry, 607 F. Supp. 1271, 1284-86 (D.C. D.C. 1985) ("Objectively viewed, and without taking race into

consideration, [the minority candidates] appear to have been unlikely candidates for promotion . . .").

The fact of the matter is that "merit" is not an absolute concept. Merit can be demonstrated in many ways, be it by performance on competitive examinations, seniority, demonstrated on the job skills, service in the military or overcoming barriers created by patterns of racial discrimination. The very fact that the city charter envisions a "list" of eligibles suggest that no one factor, including test scores, determines who should receive a position within the city government. If the city charter's framers intended that test scores would be the only consideration, the charter would have made hiring and promotions automatic, upon an applicant's obtaining the highest test score. Instead, the charter envisions that exam scores play a

substantial role in making an individual eligible for a position, but the charter does not specify how the final decision should be made. The charter delegates this task to the city council, by authorizing it to create a "modern personnel system." This entrustment necessarily assumes that the city council will bring notions of sound public policy to bear on what factors shall receive what weight on employment decisions.

Thus the court concludes that the city's affirmative action program does not "manifestly transcend" the powers given to the city council by the city charter. If the city charter is read as the principles of construction require, the city charter's words do not limit the city to a single definition of what constitutes merit in the personnel context. To conclude otherwise would violate the requirement that this court

construe the charter in favor of the existence of the city's power and against the existence of any limitation which is not expressly stated. DeYoung, 147 Cal. App. 3d at 17, 194 Cal. Rptr. at 725. Moreover, this court must resolve any doubts concerning the affirmative action plan's validity vis-a-vis the city charter in favor of the affirmative action plan's validity. Galligan, 132 Cal. App. 3d at 873, 183 Cal. Rptr. at 468.

3. The City's Action and the City's Civil Service Commission Rules

Finally, plaintiff alleges that defendants' actions violate his rights under the city's Civil Service Commission Rules. Plaintiff's claim under the civil service rules is somewhat unclear.[6/] He

6/ The court reads plaintiff's argument on Civil Service Commission Rule XVII, section 6 as being that the city violated the rule because it failed to promote the
(footnote cont'd next page)

seems to be making two, slightly different, arguments. First, he argues that the rules do not authorize the city to consider race in its decisions on whom to promote. Second, he argues that the rules forbid the city from considering race in its promotions decisions.

Plaintiff's first argument goes to the issue of whether any city law authorized the city officers to act as they did. This issue has been made largely irrelevant by the court's finding that the city's affirmative action plan authorized the city to consider race in its promotion decision. Thus, the fact that the Civil Service Rules do not

(fn. 6 cont'd.)
"best qualified person" as plaintiff argues the rule requires. See Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, pp. 18-19. However plaintiff could also be alleging that the city violated the rule by not conducting sufficient interview and investigation. This court is not addressing the latter claim.

expressly authorize racial preferences does not mean that the city acted without legal authority. It only means that the city's legal authorization came from the affirmative action plan and not the civil service rules.

Plaintiff's other argument seems to ask the court to find that the civil service rules' language indicates that the city may not consider race in its promotion decisions. This is another issue of legal interpretation, i.e., determining precisely what the rules do and do not preclude. As an issue of law, it is suitable for disposition on summary judgment.

Plaintiff emphasizes that the rules require that promotions be "based on competitive examinations and seniority." See Cardno Affidavit, Exhibit B, Rule XI, §1, p. 23. Contrary to plaintiff's contentions, this language does not mean

that competitive exam scores and seniority are the only permissible considerations. The usual rule of statutory construction requires that words be given their ordinary and commonsense meanings. The dictionary definition of the word "base" suggests that when a process is based on certain factors those factors are the "main ingredients," a "fundamental part" or a "starting point." See Webster's Third New International Dictionary, Unabridged, Massachusetts, G & C Merriam & Co., 1976 at 180. None of these definitions suggests that the "base" factors must be the sole factors in a decision-making process; in fact, the opposite seems true. The specification in the rules of "base factors" implies that additional, "non-base" factors will ultimately enter into the promotion decision.

This interpretation is supported by

Civil Service Rule XVII, section 6's requirement that the appointing power make a promotion only after interview and investigation. Cardno Affidavit, Exhibit B, p. 34. If competitive examination scores and seniority were the sole decision-making criteria, there would be no purpose in interviewing and investigating candidates for promotion. Moreover, since the rules do not require anything more than interview and investigation, the rules give the appointing authority a substantial degree of discretion in exercising the appointment power.

Plaintiff argues, on the other hand, that the rules' interview and investigation requirements should be read as limiting the exercise of appointment power to appoint only "the best qualified" person. The rule itself contains no such explicit limitation and

the court is unwilling to imply one, not to mention the difficulties of determining what constitutes being the "best qualified person." See discussion on what constitutes "merit," supra.

In short, both the "base factors" and "interview and investigation" language in the city's Civil Service Commission Rules indicates that plaintiff's interpretation of what the rules require is much too narrow. The rules by their terms do not forbid consideration of affirmative action goals. Thus, the city's consideration of affirmative action goals in promoting Mr. Cooley did not violate the rules.

To summarize, this court finds as a matter of law that the Vallejo affirmative action plan authorizes the city to consider race in its promotion decisions. To the extent that the affirmative action plan does so, it

violates neither the city charter nor the civil service rules. To that extent, defendants' motion for summary judgment on plaintiff's first cause of action must be granted, and plaintiff's motion for summary judgment on these issues must be denied.

C. PLAINTIFF'S CLAIMS UNDER TITLE VII AND SECTIONS 1981 AND 1983

Title VII prohibits an employer from:

(1) discriminating against any individual with respect to the terms, conditions or privileges of employment because of the individual's race; or

(2) limiting, segregating or classifying an employee in any way which would tend to deprive the employee of opportunities because of his race.

42 U.S.C. §2000e-2(a)(1)-(2). Plaintiff argues that defendant city's failure to promote plaintiff constitutes such discrimination against him and has deprived him of an opportunity because of his race.

Plaintiff also alleges that the city's action deprived him of rights guaranteed under the Civil Rights Acts of 1870 and 1871, 42 U.S.C. §§1981 and 1983, respectively. Section 1981 provides:

> All persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . .

Section 1983 creates a private right of action for any deprivation of civil rights under color of state law.

The law in the Ninth Circuit is that the guarantees of section 1981 and Title VII against racial discrimination are co-extensive, with neither being lesser or greater than the other in scope. London v. Coopers and Lybrand, 644 F.2d 811, 818 (9th Cir. 1981). Indeed, the test adopted in Johnson, infra, to evaluate Title VII claims originated in

part from an Eighth Circuit case that was both a Title VII and a section 1981 case. See Setser, 657 F.2d at 965.

Accordingly, the court will address the merits of plaintiff's Title VII and section 1981 claims together.

1. The Title VII Test

The Ninth Circuit recently addressed the effect of Title VII's proscriptions on affirmative action plans. Johnson v. Transit Agency of Santa Clara County, 748 F.2d 1308 (9th Cir. 1984). The Johnson court identified the test as involving shifting burdens of proof. Id. at 1310 n.2, (citing McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1973), and Setser, 657 F.2d at 968-70. Plaintiff must first establish a case of prima facie discrimination -- which is usually not contested in affirmative action cases. Id. Then the burden shifts to the employer, who must articulate a

legitimate, non-discriminatory reason for its decision. Id. In order to meet the burden of articulating a non-discriminatory reason for its hiring decision in an affirmative action case, the employer need only produce:

> (1) "some evidence that its affirmative action plan was a response to a conspicuous imbalance in the work force," and
>
> (2) "some evidence that its affirmative action plan is reasonably related to the plan's remedial purpose."

Id. Once the employer produces this evidence, the employer is entitled to judgment unless plaintiff proves that the employer's proffered reasons were actually a pretext for discrimination. Id. In the affirmative action context, plaintiff must prove that the affirmative action plan is invalid. Id.

The court noted that the line separating a "permissible" affirmative

action plan from an impermissible or invalid plan is not clear. Id. at 311. The court noted that the Supreme Court has identified some qualities of a "permissible" program:

> (1) The plan is designed to break down old patterns of segregation and hierarchy;
>
> (2) The plan does not unnecessarily "trammel" the interests of white employees;
>
> (3) The plan does not create an absolute bar to the advancement of white employees; and
>
> (4) The plan is a temporary measure designed to remedy racial imbalance but not intended to maintain racial balance.

Id. at 1311, citing United States Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 208 (1979).

2. Analysis

Neither side disputes that race was a factor in the city's decision on whom to promote; thus the requisite prima facie case of discrimination exists.

a. Plaintiff's Analysis

Plaintiff makes two general arguments that the city violated Title VII. One is that the city's action in promoting Mr. Cooley was improper since Vallejo's affirmative action plan did not and could not authorize racial preferences in employment decisions. As discussed in the previous sections, the court has resolved this legal argument against plaintiff. Thus there is no factual question as to whether plaintiff's treatment was related to the plan. Cf. Setser, 657 F.2d at 970.

Plaintiff also argues that the city's action violated Title VII by analogy to Dougherty v. Barry, 607 F.Supp. 1271 (D.D. D.C. 1985) and Harmon v. San Diego County, 477 F.Supp. 1084 (S.D. Cal. 1979). Even if these cases were binding authority, their Title VII analyses are inapplicable to the facts of

this case.

For example, if the Dougherty analysis were controlling, plaintiff would be unable to establish even a prima facie case of discrimination. The Dougherty court indicated that:

> [T]o establish the first element of the prima facie case (membership in a protected class), the white plaintiff cannot merely state his race; he must show that background circumstances support the suspicion that the defendant is the unusual employer who discriminates against the majority.

607 F.Supp. at 1282. Needless to say, plaintiff has made no showing that Vallejo consistently discriminates against whites. In fact, all the materials before the court suggest that the opposite has been historically true.

Furthermore, plaintiff has not produced any evidence which reflects the kind of anti-white animus motivating the court's decision in Dougherty, where the court observed:

> [E]ven the presence of a valid race-conscious plan will constitute a defense to Title VII litigation (or rebut a prima facie case) only if the employer acts pursuant to and within the bounds of the plan rather than according to a personal discriminatory agenda. The critical question is whether legitimate affirmative action policies, rather than racial animus motivated the race conscious employment decision at issue.

Id. at 1287 (emphasis added). The court seemed especially troubled that the black mayor and black city administrator were the individuals with the "personal discriminatory agendas" and that these agendas resulted in a distinct pattern of white exclusion. Id. at 1278-80. All of the decision-makers in Vallejo were white and there is simply no evidence that these individuals possessed anything resembling the kind of anti-white animus present in Dougherty. Furthermore, plaintiff has produced no statistics which suggest the distinct pattern of

white exclusion at issue in Dougherty.

Harmon v. San Diego County is inapplicable for a different reason. Harmon is a 1979 case in which the district court found that a county could not articulate a "legitimate, non-discriminatory reason" for any employment decision involving racial preferences; racial preferences were per se discriminatory. 477 F.Supp. at 1091. While the court's conclusion in Harmon makes semantic sense, it is at odds with the analysis subsequently adopted by the Ninth Circuit in Johnson, which specifically holds that the burden of articulating a legitimate, non-discriminatory reason may be satisfied in affirmative action cases by "some evidence" that the plan is a response to a conspicuous imbalance in the work force and reasonably related to the plan's remedial purpose. 748 F.2d at 1310 n.2.

Harmon is even at odds with Dougherty, which suggests that voluntary affirmative action plans are easier to defend than those adopted pursuant to consent decrees. Dougherty, 607 F.Supp. at 1287. The clear thrust of both Johnson and Dougherty is that voluntary affirmative action plans are a positive response to historic patterns of discrimination. Johnson, 748 F.2d at 1311 (referring to Weber's "enthusiastic endorsement" of affirmative action plans). The analysis in Harmon is outdated.

In short, plaintiff's whole theory of relief -- that the racial preferences associated with affirmative action programs violate plaintiff's rights as a white person -- is fundamentally out of step with civil rights jurisprudence. The Ninth Circuit has indicated in Johnson that there is a place for such

preferences, as long as the preferences do not transgress certain bounds.

b. The Johnson Analysis

The factual similarities between Johnson and this case should be noted at the outset. The only difference between Johnson and this case is that Johnson was an affirmative action case involving preferences based on gender. The plaintiff in Johnson had been passed over for a promotion to the position of road dispatcher in the county's transportation agency. 748 F.2d at 1309.

As in Vallejo, the county had administered a qualifying exam for the promotion. Plaintiff tied for the second highest score (75) and the female applicant received the next highest score (72.5). The examiners within the agency's road division unanimously recommended plaintiff. However, after the county's Women's Coordinator and

Affirmative Action Officer intervened, the agency director appointed the female applicant. Id.

The female applicant was appointed under the county's voluntary affirmative action plan. The plan set no quotas; nor did the court refer to any explicit preferences in the plan. The court simply noted that

> the plan established a long-range goal to attain a work force whose composition in all major job classifications approximated the distribution of women, minorities, and handicapped persons in the County labor market. The plan specified no past discriminatory Agency practices; it simply stated that women had been traditionally underrepresented in the relevant job classifications. . . .

Id. at 1309-10. The court went on to note that in 1978, when the county adopted its affirmative action plan, both of the road dispatchers were men, and in fact, not one of the agency's skilled craft positions was held by a woman. Id.

at 1310.

The Johnson court held that the county's plan was sufficiently temporary to satisfy Title VII, since it contained no statement that it was intended to be permanent and contained no fixed percentages for hiring, training and promotion. Id. at 1312. The court determined that the plan was remedial because the county could show a conspicuous imbalance in its work force. In reaching this conclusion, the court found the historical exclusion of blacks from craft unions a helpful analogy. Id. at 1313. Because of the conspicuous imbalance in the county's work force, the court concluded that the promotion of a female on affirmative action grounds "aptly served the Agency plan's remedial purpose." Id. The court also explicitly rejected the view that the selection of one applicant for a single opening could

constitute the "absolute bar" to the advancement of other employees or create an "unnecessary trammeling" of their interests. Id. at 1313-14. The court of appeals therefore reversed the district court's determination that the agency's action had violated Title VII.

Under Johnson, a defendant must first produce "some evidence" that its affirmative action plan was a response to a conspicuous imbalance in its work force. Then it must produce some evidence that the plan is reasonably related to its remedial purpose.

Defendants in the instant case have more than satisfied this court that at the time the city adopted its affirmative action plan, a conspicuous imbalance existed in its work force and that the plan is remedial. In fact, the imbalance was so "conspicuous" that the state Fair Employment Practices Commission (FEPC)

was investigating the city's employment practices at the time the city adopted its affirmative action plan.

The FEPC's report provides striking evidence of the racial makeup of Vallejo's work force. It found that Vallejo's population was roughly 30 percent minority at that time. Cardno Affidavit, Exhibit L, at 9. Yet only 11.4 percent of the city's population was minority. Id. Approximately 17 percent of the city's population was black and yet only 7.3 percent of the city's work force was black. Id. Of those employees, 64.5 percent were employed at the lower levels of the city's operation. Id. The FEPC also concluded that minorities earned substantially less than whites. Id. at 10.

Plaintiff presents no competing statistics concerning the makeup of the

city's work force. Instead, he argues that the plan was not adopted "in response to" this imbalance, since the city adopted its affirmative action plan two months before the FEPC issued its damaging report. Plaintiff contends that there is no evidence that the city had these statistics in mind when it adopted the plan. Finally, plaintiff suggests that statistics alone are not sufficient to show either a conspicuous imbalance or that a plan is remedial (citing Janowiak v. Corporate City of South Bend, 750 F.2d 557 (7th Cir. 1984)).

As for what motivated the city to adopt its plan, defendants have provided extensive evidence that it did so in an effort to forestall an unfavorable conclusion from the FEPC's investigation and potential lawsuits. This evidence includes:

Exhibit "P", dated July 28, 1972, which provides in part, "Since the City is now being investigated by FEPC, it is most timely that the City Council take some positive steps to insure that the investigation, when concluded, is not negative."

Exhibit "Q", dated September 22, 1972, which states:

As Council will recall, the California Fair Employment Practices Commission is conducting an investigation of the City's hiring practices. I have directed Mr. Ewing to prepare a draft of an Affirmative Action Program which will comply with present Federal and State law, and I hope to have this available for review in a personnel session in the near future.

Exhibit "R", dated October 6, 1972, which was accompanied by the proposed Affirmative Action Ordinance, which provides:

The attached Ordinance establishing an Affirmative Action Employment Program is submitted for your consideration. Its purpose is to bring the City of Vallejo into compliance with the requirement of the Federal Civil Rights Law of 1964 as amended in March 1972.

* * * * * *

> As Council knows the urgency for Vallejo to adopt a meaningful Affirmative Action Program is based on the present F.E.P.C. investigation. If such a program is not adopted in the very near future many of our federally funded programs may be in jeopardy. The City might find itself involved in lawsuits which could be costly not only in terms of staff time and money, but in good community relations as well.

(Emphasis added). Thus, it is clear the city was aware that the composition of its work force made it legally vulnerable, and it adopted its affirmative action plan in an effort to reduce that vulnerability.

Plaintiff's position regarding the sufficiency of statistics is clearly at odds with the prevailing law in the Ninth Circuit. In Johnson, the court expressly observed that

> [i]n order to demonstrate that its plan is remedial, an employer need not show its own history of purposeful discrimination. It is sufficient for the employer to show a conspicuous imbalance in its work force. See Setser v.

Novack Investment Co., 657 F.2d at 968. This is well illustrated by Weber, in which the employer hired as craftworkers only persons who had previous craft experience. Because blacks had historically been excluded from craft unions, few had previous craft experience and, consequently, few were hired. Weber, 443 U.S. at 198-99, 99 S.Ct. at 2724-25. Although the employer did not engage in purposeful discrimination, only 1.83% of the employer's skilled craft workers were black. Because the local work force was 39% black, the employer was justified in adopting the affirmative action plan.

> Statistics are extremely useful in showing a conspicuous work force imbalance. We note particularly the difficulty that may confront an employer whose plan is intended to remedy discrimination resulting from societal norms. Some forms of discrimination are so subtle or so accepted that they defy proof other than by statistics. In Weber, the exclusion of blacks from craft unions was so pervasive as to warrant judicial notice. Weber, 443 U.S. at 198 n.1, 99 S.Ct. at 2725 n.1.

748 F.2d at 1313 (footnote omitted). Plaintiff's position is also at odds with the Eighth Circuit case on which Johnson

based its analysis, Setser. The panel in Setser explicitly held that a showing of conspicuous racial imbalance by statistics is sufficient to meet the employer's burden of producing some evidence of a remedial purpose. 657 F.2d at 968.

Furthermore, defendants have presented evidence of the city's past discriminatory practices. In the FEPC report, the FEPC criticized the city for using employment screening devices (e.g., photographic identification) which have been outlawed because of their propensity to facilitate discrimination. The FEPC also criticized the city for not checking its qualifying exams for ethnic bias and job-relatedness. See Cardno Affidavit, Exhibit L, at pp. 9-11.

Plaintiff also seems to suggest that, in order for the statistics and findings of past discrimination to

constitute an effective defense to the city's action, the city must incorporate them as official findings in its affirmative action. Again, plaintiff's position is contrary to established precedent. The court in Stetser expressly held that evidence that an employer implemented its plan in response to findings of a racially imbalanced work force by a federal or state agency meets the employer's burden of producing some evidence of a remedial purpose. 657 F.2d at 968. While the affirmative action plan at issue in Johnson did contain such recitations, the Johnson court did not indicate that the affirmative action plan had to be the source of such information. Indeed, the fact that the information in this case comes from an independent state investigative agency enhances the information's reliability and probative value.

Moreover, the Johnson court stated that affirmative action plans "should not be rigidly interpreted so as to make their validity depend on technicalities in drafting." Id. at 1312. The court found that doing so "would only discourage their adoption and encourage litigation." Id. Requiring recitations of statistics would place a premium upon "technicalities in drafting" -- precisely the result the Johnson court sought to avoid.

Thus, the result in Johnson makes plaintiff's position on the conspicuous imbalance/remedial purpose issues wrong as a matter of law. Furthermore, plaintiff has produced no evidence (i.e., "significant probative facts") which would rebut defendants' showing that the city adopted its affirmative action plan as an effort to remedy at least some of the imbalances in its work force. Given

defendants' strong showing, plaintiff has not provided this court with any evidence to support his claims on these issues.

Plaintiff also argues that Vallejo's plan is not "reasonably related" to its remedial purpose, because it states as its goal a work force composition which mirrors the composition of Vallejo's population. Defendants' evidence of reasonableness is the FEPC's report, which also assessed the composition of the city's work force against the city's population. Plaintiff argues, in effect, that it would be more reasonable for the plan's goals to be keyed to the composition of the city's labor composition.

While this may be so, plaintiff has presented no evidence to show that the disparity between the city's general population composition and its labor composition is so great that the plan

operates unreasonably in this respect. Again, plaintiff asks this court to speculate as to what might be without producing any factual information from which reasonable inferences might be made. Without such information, which plaintiff has the duty to produce on summary judgment, the court cannot conclude that a genuine issue of triable fact exists. Furthermore, the Supreme Court has suggested that comparisons between the composition of a work force and the composition of the general population is proper in the context of discerning whether discrimination exists. Hazelwood School District v. United States, 433 U.S. 299, 308 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977).

The Setser court held that a plaintiff in a reverse discrimination

case must produce two kinds of evidence in order to avoid summary judgment, namely, evidence which shows that (1) some reason other than a "remedial reason" motivated the employer when implementing the plan, or (2) the plan adopted unreasonably exceeds its remedial purpose. 657 F.2d at 962. The court ruled that a failure to produce such evidence warrants summary judgment in favor of defendants. Id. Plaintiff in this case has produced neither kind of evidence.

Plaintiff has also failed to make a persuasive showing on the final four factors identified in Johnson. As noted above, plaintiff has not shown that the plan was designed to do something other than break down old patterns of racial segregation and hierarchy.

The next two elements plaintiff must prove under Johnson is that the city's

plan "unnecessarily trammels" the interests of white employees and that the program creates an "absolute bar" to whites' advancement. Plaintiff's basic argument on these points is that the city's action trammeled his interests and barred his advancement.

The Ninth Circuit has specifically rejected this kind of argument, observing that

> [w]hen there is but one opening, the selection of one candidate will necessarily result in the exclusion of all others. Unless we are shown a distinct pattern of exclusion of non-minority candidates from such positions, we cannot conclude that a single employer decision serves as a bar or unnecessarily trammels the interests of other employees.

Johnson, 748 F.2d at 1314. Plaintiff has offered no evidence of "a distinct pattern of exclusion." Indeed, the city points out that the previous three people appointed to the firefighter/engineer classification were white. At the time

Mr. Cooley was promoted, there were no blacks in this classification. In fact, in the department's history, only two blacks had ever occupied this position. See Wells Declaration, p. 2.

The final Johnson criterion is temporariness: the affirmative action plan must be a temporary measure, designed to eliminate a manifest racial imbalance, but not to maintain racial balance once it is achieved. In Johnson, the court held that the plan's focus must be on "attaining" racial balance. An explicit termination date is not necessary; the plan must be temporary in the sense that its programs will end when parity is achieved. 748 F.2d at 1312.

Plaintiff says that "it is difficult to believe the city will stop using race once parity is achieved," and makes other statements to the effect that there is no evidence that the plan is temporary.

As indicated above, however, the local law most clearly providing for the operation of racial preferences is the city's July resolution authorizing the city to hire minorities at rates which exceed the minorities' proportions in the Vallejo population. This court has concluded that the fact that this policy is embodied in a resolution instead of an ordinance does not mean that the resolution no longer has any force after the passage of a subsequent ordinance; however, the policy's embodiment in a resolution does provide some evidence that this part of the city's affirmative action plan is more temporary than are other parts of the plan. Moreover, there is language in the resolution which provides that "until parity is met, the City Council shall review and assess annually during the month of September its Affirmative Action Policy and shall

review its goals and timetables accordingly." See Cardno Affidavit, Exhibit M, p. 2 (emphasis added). This also indicates that the city's policy is temporary, since the provisions for annual review and assessment suggest that the city intends to revise its policies in light of the progress made toward attaining parity.

The Ninth Circuit has concluded that a city's failure to expressly provide that its affirmative action policy is temporary does not preclude a finding of temporariness.

> While the Agency plan contains no date certain or other express statements of fixed duration, it also contains no statement that it is intended to be permanent. Moreover, the entire focus of the plan is on "attaining," rather than maintaining, balance. . . .

Johnson, 748 F.2d at 1312. The court went on to note:

> Plans like this one are usually voluntarily adopted by employers

> who wish to express and act upon their commitment to social justice. They should not be rigidly interpreted so as to make their validity depend on technicalities in drafting. To do so would only discourage their adoption and encourage litigation . . . The Weber Court did not establish a rigid formula for testing the validity of an affirmative action plan . . . Undoubtedly a plan must end when its remedial function has been served. The fact that the plan must end, however, does not necessitate the inclusion of an explicit ending provision.

Id.

Finally, the court observed that the fact that a plan allowed for flexibility in working towards long-range goals, "with special emphasis on recruitment, selection, training and promotion of minorities, women and the handicapped" suggests that the plan is temporary. Id. at 1312-13. The court distinguished plans with fixed percentages for hiring, training and promotion, pointing out that such plans "necessitated a reasonably

explicit deadline." Id. at 1312. Vallejo's affirmative action plan fits in the "flexible" category, since it does not establish fixed percentages and merely sets a "goal" of hiring more minorities. Vallejo's affirmative action plan also has the requisite emphasis on recruitment, selection, training and promotions of minorities. Thus, Vallejo's plan is sufficiently temporary to satisfy the Johnson criteria. Id. at 1313.

Accordingly, this court concludes that the city's affirmative action plan is valid and permissible under Title VII and sections 1981 and 1983. Defendants have supplied extensive factual materials to substantiate their allegations concerning the history and motivations underlying the plan. Plaintiff has presented no evidence which would raise the requisite genuine issue of material

fact concerning defendants' showing. Defendants' motion for summary judgment on the Title VII, section 1981 and section 1983 claims must therefore be granted, and plaintiff's motion on the same issues must be denied.

D. PLAINTIFF'S CLAIMS UNDER FOURTEENTH AMENDMENT AND TITLE VI

Plaintiff also contends that the city's action in promoting Mr. Cooley denied plaintiff's rights to equal protection under the fourteenth amendment. This alleged violation of the equal protection clause also constitutes the basis for plaintiff's Title VI claim, since Title VI only proscribes those racial classifications which violate the equal protection clause. Regents of the University of California v. Bakke, 438 U.S. 265, 287 (1978). Title VI generally prohibits recipients of federal funds from denying persons the benefits of

those funds on the basis of race.

Determining the permissibility of affirmative action programs in light of the fourteenth amendment and Title VI involves a different analysis than that required under Title VII and sections 1981 and 1983. Bratton v. City of Detroit, 704 F.2d 878, 884 (6th Cir.), on reh'g, 712 F.2d 222 (1983), cert. denied, 464 U.S. 1040, reh'g denied, 465 U.S. 1074 (1984). At least one circuit has held that the fourteenth amendment/Title VI test is "more exacting" than the Title VII test for affirmative action programs. Janowiak, 750 F.2d at 563. Yet identifying the precise manner in which the test is "more exacting" is difficult, since the test is much less clearly defined. Id.; Bratton, 704 F.2d at 885; Valentine v. Smith, 654 F.2d 503, 508 (8th Cir.), cert. denied, 454 U.S. 1124 (1981). The Supreme Court has

examined the issue on two occasions and has issued two plurality decisions with eleven separate opinions in all. Janowiak, 750 F.2d at 557 (referring to Fullilove v. Klutznick, 448 U.S. 448 (1980) and Bakke, 438 U.S. 265 (1978)).

It is clear that the constitutional guarantee of equal protection does not prohibit affirmative action programs. Valentine, 654 F.2d at 507-08. It is also clear that although such programs are subjected to "strict scrutiny" under Bakke, it is not the same kind of strict scrutiny in cases involving majority discrimination against minorities (i.e., "strict in theory, fatal in fact"). Bakke, 438 U.S. at 361-62; Bratton, 704 F.2d at 886 (citing Detroit Police Officers v. Young, 608 F.2d 671, 697 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981).

The basic test requires that the

proponents of an affirmative action program show:

(1) that the program serves "some governmental interest"; and

(2) that the program is "somehow directed toward the achievement of that objective."

Janowiak, 750 F.2d at 563; Bratton, 704 F.2d at 885.

1. Substantial Government Interest

Bakke, Janowiak and Bratton all indicate that, in order to establish a substantial and important government interest in remedying racial discrimination, some governmental agency must have made a finding of past discrimination. Bakke, 438 U.S. at 307-09; Janowiak, 750 F.2d at 563-64; Bratton, 704 F.2d at 888. For example, the plurality in Bakke noted:

> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in

> the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. [Citations omitted.] After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

438 U.S. at 307-09 (footnote omitted).

As already determined, Vallejo's affirmative action plan satisfies this requirement. The state FEPC's report suggested <u>both</u> statistical disparities and unlawful practies in municipal

employment. The report also contained thinly veiled threats of legal action in the event that Vallejo failed to aggressively implement an affirmative action plan:

> If the City of Vallejo does not want government agencies to impose solutions to its local problems, then it must begin to resolve its own problems in a forthright and immediate manner.
>
> In view of the present atmosphere and because of the serious under-utilization of minorities, the need to take affirmative steps is apparent. While the City has at least begun to give this area some consideration, these efforts must be continued and expanded. Therefore, in light of those considerations, the final section of this report dealing with recommendations may be the most critical in implementing an effective Affirmative Action Program.

Cardno Affidavit, Exhibit L, at 12 (emphasis added). The FEPC's recommendations included the following:

> 1. The City is to continue toward the implementation of its planned Affirmative Action Program as per

Ordinance No. 138, adopted February 26, 1973, with the following modification:

The City is to complete its Affirmative Action Program and submit it to the FEPC no later than July 1, 1973, for evaluation. The program will contain a complete utilization analysis of the present work force and community resources by each work category, identification of each problem area based upon the utilization analysis, the City's stated goals or corrective measures which are to be specific and planned for measurable results with timetables for completion, as well as additional ingredients designed to improve employment opportunities for minorities and women in the City of Vallejo.

2. The City should re-evaluate the role of testing and selection standards in light of recent court decisions, and eliminate all procedures which are resulting in "adverse impact" on women and minorities. . . .

* * * * *

5. A review of qualifications and abilities of all present minority and female employees should be conducted to determine the possibility of immediate upgrading or lateral movement to afford promotional opportunity into other job classifications that would be commensurate with the employees' abilities.

6. All applications, questionnaires, and required documents must immediately be reviewed to determine their legality and appropriateness. Photographs (whether on Drivers' Licenses or other documents) must no longer be used and documents indicating racial or ancestral designation may only be used after an applicant is appointed to a job. All questions or references to race, ancestry, national origin or sex must be discontinued immediately. . . .

7. Increased efforts in minority recruitment must be instituted. This process should be flexible and decentralized, and the individual departments must take a more active role. An "Affirmative Action File" should be established wherein applications from minority-group members are placed in a separate file. When positions become available, a review of this file should be conducted to determine if qualifiable applicants are available. The use of this file should not require the exclusion from consideration of other applicants, but should be utilized only as another recruitment procedure.

Id. at 13-14 (emphasis added). The FEPC concluded its report with another threat:

RECOMMENDATION TO THE COMMISSION

> The underutilization of minorities and females in the City of Vallejo will not significantly improve if the City continues its laxness in carrying out equal employment opportunity programs. Continued failure to meet its EEO commitments may leave the Commission no alternative but to ask for the intervention of the State Attorney General. In order to avoid such drastic measures, it is suggested that the Commission request the City of Vallejo to submit a written response to the preceding summary of recommendations within sixty days, the response to include a target date for the implementation of each item.

Id. at 14 (emphasis added).

Thus Vallejo's plan was adopted in the context of administrative determinations of civil rights violations. Furthermore, the FEPC's report indicated that the necessary continuing oversight of Vallejo's employment practices would occur. As both Bakke and other cases suggest, the agency making the findings of discrimination need not be the same as the agency adopting the affirmative

action plan. See Valentine, 654 F.2d at 508 (and cases cited). Indeed, requiring a city to admit to its own unlawful practices before taking remedial steps would create tremendous disincentives to affirmative action. Such admissions would virtually invite lawsuits.

Therefore, this court finds that Vallejo's affirmative action policies are responsive to identified patterns of discrimination in Vallejo. The affirmative action policies at issue thus serve the "substantial and important government interest" required by the equal protection clause.

2. Substantial or Reasonable Relationship to Policies' Remedial Objectives

Once a legitimate government interest in an affirmative action plan is established, the government must show that the program is "somehow related" to

achieving its objectives. Courts have reformulated this principle into a requirement that the program be "substantially related" to its remedial objectives, see Valentine, 654 F.2d at 510, or a requirement that the remedial measures are "reasonable." Bratton, 704 F.2d at 886.

Bakke is a useful starting point for analysis since the approach used in Vallejo is very similar to that approved by the Bakke plurality which concluded the University of California's admissions policy was unreasonable because it involved "an explicit racial classification" to exclude white applicants from a specified percentage of the seats in the entering class. 438 U.S. at 319. See also Peters v. Moses, 613 F.Supp. 1328 (W.D. Va. 1985). The Court contrasted this system with Harvard's admissions program. Harvard's

system was permissible because it used race as a "plus" factor, rather than an absolute criterion. Id. at 318. The Court explained that

> [t]his kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitvely, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Id. (footnote omitted). The Court concluded, in essence, that fixed racial "quotas" are an unreasonable means of achieving ethnic diversity in a student body.

Vallejo's affirmative action program

employs no such quotas. Instead, it employs the kind of "plus factor" system approved by the Court in Bakke. Mr. Cooley's scores on the qualifying exam made him eligible for the promotion to the firefighter/engineer position. Mr. Cooley competed with the other applicants and was not even considered for a promotion until his score put him among the top three applicants. Only then was Mr. Cooley's race used as a plus factor in the determination of the person who should be promoted.

Plaintiff also competed for the promotion. Although his exam score placed him on the list of eligibles for three previous promotions, each of these times plaintiff was passed over in favor of other white applicants. See Cardno Affidavit at 3. At no point in any of these selection proceedings has plaintiff been foreclosed from consideration for

the position. When he competed with Mr. Cooley, however, plaintiff's combined qualifications, including the non-objective factor of race, did not outweigh those of Mr. Cooley. Bakke notes that this result, although unfortunate for plaintiff, is compatible with the fourteenth amendment.

Other courts have used the following as indicia of reasonableness/relatedness:

1. the plan's implementation and/or goal is to hire a sufficient number of minorities so that their proportion roughly approximates, but does not unreasonably exceed, the proportion which would have been achieved in the absence of discrimination, Valentine, 654 F.2d at 510;

2. the plan does not unduly stigmatize whites by either 1) completely barring them or otherwise denying them access to positions, and/or 2) results in the selection of unqualified minorities, Bratton, 704 F.2d at 890-892; Valentine, 654 F.2d at 510;

3. the plan does not otherwise "unnecessarily trammel" the interests of non-minorities, Bratton, 704 F.2d at 892; Valentine, 654 F.2d at 510;

4. the plan is temporary, enduring only as long as necessary to achieve its legitimate goals, Bratton, 704 F.2d at 892; Valentine, 654 F.2d at 510.7/

Vallejo's affirmative action plan satisfies these tests for reasonableness as well.

7/ Bratton's requirement that the use of racial classifications reflects the only legitimate method for achieving the plan's objectives, in light of the urgent need for a remedy and the practical limits on the effective use of other means, 704 F.2d at 892, has been excluded on the grounds that Bratton involved a quasi-quota system where a fixed number of promotions (50 percent) went to blacks. 704 F.2d 878. Presumably the use of fixed quotas would require a greater showing of necessity in light of Bakke. Furthermore, while the Bratton court recites this as a consideration, it never applies this test in its analysis of whether the plan at issue was reasonably related to its remedial goals. Thus it is not clear how central this test is to the determination of reasonableness.

This court has already found that Vallejo's plan is temporary and does not unnecessarily trammel the interests of non-minorities. Obviously, whites had not been completely barred from the position of firefighter/engineer; the three promotions immediately preceding Mr. Cooley's went to whites and only two blacks had ever occupied this position in the department's history. At the time Mr. Cooley was promoted, no blacks occupied this position, as already shown.

The court has also already concluded that the fact that Mr. Cooley scored 1.08 points below plaintiff (plaintiff's score was 94.17 and Mr. Cooley's was 93.09) does not make Mr. Cooley "unqualified" or even less qualified to occupy the firefighter/engineer position. See also Cardno Affidavit, at 11-12 ("trying to make some definitive statement about the quality of candidates that are separated

by a few points is totally and completely meaningless.")

Finally, Vallejo's goal of achieving a work force composition which corresponds to the population in Vallejo satisfies Valentine's requirement that the number of minorities hired not unreasonably exceed the proportion that would have been hired in the absence of discrimination. This is the comparison used by the FEPC. See also Bratton, 704 F.2d at 897. Plaintiff has supplied this court with no evidence which would indicate that using the population as a benchmark would result in hiring unreasonably excessive numbers of minorities.

The court therefore finds that Vallejo's affirmative action plan both serves a substantial and important government interest and is reasonably related to the achievement of its

objectives. Defendants' motion for summary judgment on the fourteenth amendment and Title VI issues will be granted and plaintiff's motion for summary judgment on these claims will be denied.

E. PLAINTIFF'S CLAIMS UNDER THE STATE CONSTITUTION

Plaintiff also alleges that the city's action violated his rights under Article 1, sections 7 and 8 of the California Constitution. State law treats the equal protection standards of the State Constitution as being essentially the same as those of the fourteenth amendment. Hull v. Cason, 114 Cal. App. 3d 344, 375, 171 Cal. Rptr. 14, 31 (1981); Price v. Civil Service Commission of Sacramento County, 26 Cal. 3d 257, 284, 161 Cal. Rptr. 475, 492, 604 P.2d 1365, cert. dismissed, 449 U.S. 811 (1980) (addressing §7 only); Minnick v.

California Department of Corrections, 95 Cal. App. 3d 506, 523, 157 Cal. Rptr. 260, 270 (1979), cert. granted, 448 U.S. 910 (1980) cert. dismissed, 452 U.S. 105 (1981) (addressing §8 only; requiring only that racial "preferences" not exclude others from eligibility or having others' qualifications weighed competitively in the process).

Since summary judgment in favor of defendants is proper for plaintiff's fourteenth amendment claim, it is also proper for plaintiff's state constitutional claims. As a result, the court must grant defendants' motion for summary judgment on plaintiff's claims under Article 1, sections 7 and 8 of the California Constitution, and plaintiff's motion for summary judgment on these claims will be denied.

III. PLAINTIFF'S MOTION TO STRIKE

Plaintiff moved to strike extensive

portions of the affidavit defendants submitted in support of their motion for summary judgment. Plaintiff indicates that his "major" objection to the affidavit is that the affiant's comments concerning the nature and import of the documents appended to the affidavit violate the "best evidence" rule. See Plaintiff's Reply to Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to Strike, p.2; see also Fed. R. Evid. 1002.

Plaintiff further argues that the affiant's comments lack personal knowledge and constitute impermissible opinion evidence, and that Exhibits F and G (the arbitrators' opinions) should be stricken as irrelevant.

Federal Rule of Civil Procedure 56(e) provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts

> as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Rule 56(e) therefore instructs the court to disregard any material in affidavits not meeting the above requirements when ruling on motions for summary judgment.

To the extent the affiant summarizes or characterizes documentary evidence appended to the affidavit, the court has looked to the documents themselves as the best evidence of their contents. See Fed. R. Evid. 1002. The court has also disregarded affiant's comments concerning what happened prior to affiant's employment with the city as being without personal knowledge.

The court finds, however, that the affiant's comments regarding the significance in test score differences do not constitute impermissible opinion evidence. His declarations concerning

his background and training in personnel matters provide the necessary foundation to qualify him as an expert under Fed. R. Evid. 702. See Affidavit submitted in Support of Defendants' Motion for Summary Judgment, ¶¶ 32-37.

The court also finds that the opinions of the arbitrators should not be stricken. The Supreme Court has made it clear that courts are entitled to give arbitral decisions such weight as deemed appropriate, notwithstanding that the purposes of arbitration and adjudication are frequently different in the civil rights context. Alexander v. Gardner-Denver Co., 415 U.S. 36, 57-61, 94 S.Ct. 1011, 1024-25 (1974).

Finally, the court finds that the affiant did have personal knowledge that the city manager "was aware of" certain facts regarding the makeup of the city's work force, since the affiant purportedly

told the city manager these facts.

Accordingly, the court will grant plaintiff's motion to strike only to the extent indicated by the above discussion.

IV. CONCLUSION

To summarize, the court finds, as a matter of law, that Vallejo's affirmative action plan did authorize the actions at issue in this lawsuit. Moreover, Vallejo's affirmative action plan is consistent with the fourteenth amendment of the United States Constitution, the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §1981 and 42 U.S.C. §1983, respectively, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1), 2(a)(2), Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, Article 1, sections 7 and 8 of the California Constitution and Vallejo's City Charter and local law.

Accordingly, defendants' motion for

summary judgment on all causes of action in plaintiff's complaint is GRANTED.

Plaintiff's motion for partial summary judgment on all of plaintiff's causes of action is DENIED.

Plaintiff's motion to strike portions of defendants' affidavit in support of defendants' motion for summary judgment is GRANTED to the extent indicated above, and is DENIED as to the rest.

IT IS SO ORDERED.

DATED: March 11, 1986.

/s/ Milton L. Schwartz

UNITED STATES DISTRICT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICK HIGGINS,
Plaintiff-Appellant,
v.
CITY OF VALLEJO,
Defendant-Appellee.

No. 86-1904
D.C. No.
CV-85-0060-MLS
OPINION

Argued and Submitted
February 12, 1987—San Francisco, California

Filed July 29, 1987

Before: Herbert Y. C. Choy, Harry Pregerson and
William C. Canby, Jr., Circuit Judges.

Opinion by Judge Pregerson

Appeal from the United States District Court
for the Eastern District of California
Milton L. Schwartz, District Judge, Presiding

SUMMARY

Employment Discrimination

Appeal from a summary judgment for defendants. Affirmed.

Appellant Patrick Higgins (Higgins) was ranked first in examinations for a firefighter/engineer position with the defendant, the Vallejo (California) fire department, and the

fire chief recommended he be given the position. The city manager, consistent with the city's affirmative action plan, promoted Errol Cooley, a black male, instead. Cooley was ranked third, with a score of 93.09, compared with Higgins' score of 94.17. The firefighters union filed a grievance but an arbitrator found no violation of the labor agreement. Higgins filed this action alleging violations of Title VII, constitutional rights and local laws. The court granted the defendant's motion for summary judgment.

[1] Higgins' argument that Cooley's promotion violated the City Charter and affirmative action ordinance is rejected because it disregards the underlying purpose of the affirmative action plan. [2] The City Charter stresses the importance of merit, [3] but a city resolution also calls for hiring minorities. [4] The court correctly concluded that a harmonious reading of the Charter, rules, and affirmative action plan indicates that promotions should be given only to qualified individuals, but that race may be used as an additional factor. [5] The promotion of Cooley is in accord with city goals of achieving equal opportunity without sacrificing quality in its workforce and did not violate the City Charter or affirmative action plan.

[6] Higgins bears the burden of showing that the City's affirmative action plan violates Title VII, and has not met this burden under *Johnson v. Transportation Agency, Santa Clara County*, 107 S.Ct. 1442 (1987), a case upholding an affirmative action plan which allowed a woman to be appointed over a higher scoring man to help correct an underrepresentation of women in the workplace. [7] The City concedes that race was taken into consideration, so Higgins has established a prima facie case of discrimination, and the City has established a nondiscriminatory reason for the employment decision. [8] It remains for Higgins to show that the plan is invalid. [9] The first issue the *Johnson* court considered in analyzing whether its affirmative action plan complied with Title VII was whether consideration of the sex of applicants

was justified by the existence of a manifest imbalance reflecting underrepresentation of women. [10] Vallejo's affirmative action plan was adopted as a result of a finding that blacks and other minorities were underrepresented on the city work force. [11] The *Johnson* court's requirement that the affirmative action plan be responsive to a manifest imbalance in the workforce is therefore satisfied. [12] The *Johnson* court also addressed whether the affirmative action plan unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement. [13] Factors considered in approving the plan in *Johnson* included that the plan established no quotas. Vallejo's affirmative action plan was similarly free of rigid quotas. [14] In both the *Johnson* and the Vallejo plan, the plaintiff had no absolute entitlement to the position because the hiring official was authorized to pick from the top candidates. [15] In both cases the plaintiffs retained their jobs, salaries, seniority and eligibility for future promotion. [16] Also in both cases, the plans were intended to attain a balanced work force, not to maintain one. [17] Like the plan in *Johnson*, the Vallejo affirmative action plan is in full conformity with Title VII.

[18] Cooley's promotion also satisfies even the most rigorous equal protection requirements. [18] The Supreme Court has consistently recognized that government bodies constitutionally may adopt racial classifications as a remedy for past discrimination. [20] The record provides abundant evidence that Vallejo engaged in past discrimination, and [21] the City's plan is narrowly tailored to achieve racial balance [22] and does not use layoffs to achieve its goals. [23] Because the plan is narrowly tailored to further the City's compelling interest in remedying past discrimination, the hiring of Cooley under the plan does not violate the equal protection clause.

COUNSEL

Alan C. Davis, San Francisco, California, for the appellant.

Michael H. Roush, Vallejo, California, for the appellees.

OPINION

PREGERSON, Circuit Judge:

Appellant Patrick Higgins, a white male, filed a reverse discrimination suit against the City of Vallejo, California ("the City"). In his complaint, Higgins alleges that the hiring of Errol Cooley, a black male, instead of Higgins for the position of firefighter/engineer violates the City's Charter and other local laws, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17, and the equal protection clause of the fourteenth amendment to the United States Constitution. The district court granted summary judgment for defendants on all claims, and we affirm.

BACKGROUND

In December of 1983, a firefighter/engineer position became available in the Vallejo fire department. Patrick Higgins and Errol Cooley, ordinary firefighters in the department, both decided to apply for promotion to the firefighter/engineer position. Along with numerous other firefighters, they took a competitive written examination and three practical examinations. The applicants were ranked according to their performance on the examinations. At the time when the position became available, Higgins ranked first, with a score of 94.17 out of 100, and Cooley ranked third, with a score of 93.09.

The City charter vests the power of appointment to various City positions in the city manager. The chief of the fire department recommended to the city manager that Higgins be granted the promotion to firefighter/engineer. The city

manager instead promoted Cooley because the selection of Cooley was consistent with the City's affirmative action plan.[1]

The Vallejo Firefighters Union, Local 1186, AFL-CIO, filed a grievance on behalf of Higgins concerning the promotion of Cooley. The grievance alleged that Cooley's promotion violated the labor agreement between the Union and the City. The arbitrator found no violation of the labor agreement. Higgins then filed this action in the district court alleging violations of local law, Title VII, the California constitution, and the United States Constitution. Both parties filed motions for summary judgment. The district court granted defendants' motion for summary judgment on the ground that the promotion of Cooley was consistent with local laws, federal statutes, and the state and federal Constitutions. Higgins appeals on all issues except the state constitutional issue.

DISCUSSION

We review de novo district court orders granting summary judgment. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986) (citing *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983)); *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986). This court's review is governed by the same standard used by the district court under Fed. R. Civ. P. 56(c). *Darring*, 783 F.2d at 876. We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986).

[1]Cooley was promoted to firefighter/engineer in December 1983. In February 1986, Higgins was promoted to firefighter/engineer as well. This action is not moot, however, because it affects back pay, benefits, and seniority rights.

I. *Vallejo City Charter and Other Local Laws*

[1] Appellant Higgins argues that by promoting Cooley the City violated the City charter and the City affirmative action ordinance. Because appellant's argument would require us to disregard the underlying purpose of the City's legitimate affirmative action plan and to read the City's laws as inconsistent with one another, we reject it.

The City charter provides for the hiring of City employees and sets forth the basic principle that race should not be considered in employment decisions if such consideration is inconsistent with the merit principle. Section 500 of the charter lists the powers and duties of the city manager, which include the appointment of City employees. At Section 800, the Charter provides that "[a]ll appointments shall be based on ability and experience as determined by tests and records of achievement." The City's Civil Service Commission rules provide that after applicants for a promotion have taken various competitive examinations, their names should be placed on a list in rank order, with extra points given for seniority and veteran status. Once the list is compiled, the names of the top three applicants are certified. The city manager may grant the promotion to any of the certified individuals.

[2] The City Charter stresses the importance of the merit principle. Section 803 states that the City Council shall create a "modern system of personnel administration" that includes provision for:

a. an orderly system of positive recruiting and competitive examinations for entrance to the civil service, *free of all political, religious, racial and other considerations not consistent with the merit principle,* and properly advertised;

b. a system for promotions within the service based on competitive examinations or demon-

> strated merit as shown by records of performance and seniority, or some combination thereof. . . .

(Emphasis added.)

When the City promoted Cooley in 1983, the City's affirmative action plan consisted of a resolution passed in July 1982 and an ordinance adopted in September 1982. An investigation conducted by the California Fair Employment Practices Commission before the plan was adopted indicated that the City's employees were not representative of the racial makeup of the City's population.

[3] The July 1982 resolution stated:

> It is the goal of the City of Vallejo to hire and to promote within the City Government at the various levels of compensation and in the various groups of classifications such that the racial or ethnic and gender composition of the City Government work force will be consistent with the racial and gender composition of the City, as established by the 1980 Census for the City of Vallejo.
>
> *Implementation of the City's goal will be achieved by a hiring and promotion policy aimed at minorities and women that includes a rate in excess of their proportion in the population of the City.*

(Emphasis added.)

The September 1982 ordinance stated the same goal of equal employment opportunity, but also reaffirmed the City's adherence to the merit principle. Among the ordinance's statements of findings and declarations was this provision:

> B. The Council of the City of Vallejo continues to declare its intention to accomplish this goal of equal

> employment opportunity within the framework of the City Charter which requires an orderly system of positive recruiting and competitive examinations for entrance to the civil service of the City of Vallejo, and for advancements and promotion in the Civil Service based upon competitive examinations or demonstrated merit as shown by records of performance and seniority or some combination thereof, *free of all political, religious, racial and other considerations not consistent with the merit principle.*

The district court's unpublished disposition contains a well-supported and well-reasoned analysis of the intricacies of the charter, the ordinance, and the resolution and of the relationship among them. The court cites the basic rule of harmony in statutory interpretation, *see Watt v. Alaska*, 451 U.S. 259, 267 (1981), and the strong presumption of validity for municipal laws, *see City of Industry v. Willey*, 11 Cal. App. 3d 658, 663, 89 Cal. Rptr. 922, 924 (1970).

[4] The district court correctly concluded that a harmonious reading of the City's charter, Civil Service Commission rules, and affirmative action plan indicates that promotions should be granted only to qualified individuals, but that race may be used as an additional factor in selecting among a group of qualified candidates. Under this reading, promotions are to be "based on" merit, but the City may also consider additional factors that are consistent with the merit principle. Race is one such additional factor.

[5] Appellant's argument that local law prohibits a consideration of race is based on the unsupported premise that taking race into consideration is inconsistent with the merit principle. The City's mandate that appointment "be based on ability and achievement" does not preclude consideration of an applicant's race. In addition, appellant assumes that the merit principle requires giving a promotion to the applicant with the highest numerical test score. The Civil Service Com-

mission rules do not require an absolute devotion to test scores. The rules do not require the city manager to select the highest ranking eligible candidate; instead, the city manager retains discretion to choose among the top three. As the City's affirmative action ordinance indicates, the City wanted to achieve equal opportunity, but did not want to sacrifice quality in its work force. The promotion of Cooley is in accord with these goals. Thus, the promotion of Cooley does not violate the City charter or the City affirmative action plan.

II. *Title VII*

[6] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Plaintiff bears the burden of showing that the City's affirmative action plan violates Title VII. *Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 1449 (1987). We hold that, under *Johnson*, Higgins has not carried his burden.

This case, like *Johnson*, fits within the analytic framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972). Under *McDonnell Douglas*, once a plaintiff in a Title VII action establishes a prima facie case that race or sex has been considered in the employment decision, the burden shifts to the employer to show a legitimate nondiscriminatory reason for the decision; an affirmative action plan can be one such reason. *Johnson*, 107 S. Ct. at 1449. Once the employer satisfies this requirement, the burden shifts back to the plaintiff to show that the asserted nondiscriminatory reason is a pretext and that the affirmative action plan is invalid. *Id.*

[7] The City concedes that when the city manager hired Cooley instead of Higgins, he took their respective races into consideration. Thus, appellant has established a prima facie case of discrimination. The City has alleged that it decided to promote Cooley rather than Higgins pursuant to the City's affirmative action plan. Because, as stated above, we hold that the decision to promote Cooley conforms with the City's affirmative action plan, the City's burden of establishing a nondiscriminatory reason for the employment decision is satisfied.

[8] It remains, then, for Higgins to show that the City's affirmative action plan is invalid. The Supreme Court set out standards of invalidity in *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979). In *Johnson*, the Court applied *Weber*'s standards to a case much like the one before us.

In *Johnson*, Diane Joyce and plaintiff Paul Johnson were both highly experienced road workers for the County of Santa Clara. They both applied for promotion to a road dispatcher position. Out of seven applicants receiving the required score of 70 or above, Johnson tied for second with a score of 75, and Joyce placed fourth with a score of 73. Joyce was granted the promotion pursuant to a County affirmative action plan designed to achieve a long-range goal of parity between the

sexes. The Supreme Court concluded that the promotion of Joyce was permissible because it was made pursuant to an affirmative action plan that is "fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination." *Johnson*, 107 S. Ct. at 1457.

A. *Manifest Imbalance*

[9] The first issue the Court considered in analyzing whether the affirmative action plan in *Johnson* complied with Title VII was whether the employment decision at issue "was made pursuant to a plan prompted by concerns similar to those of the employer in *Weber*." *Id.* at 1452. The Court restated this issue as "whether consideration of the sex of applicants for skilled craft jobs was justified by the existence of a 'manifest imbalance' that reflected underrepresentation of women in 'traditionally segregated job categories.' " *Id.* (quoting *Weber*, 443 U.S. at 197). The Court held that the County of Santa Clara faced a serious deficiency of women in its work force and that the County's plan allowing sex to be considered as between two qualified applicants for promotion was the County's attempt to remedy this deficiency.

The City of Vallejo has likewise satisfied this first requirement of *Johnson*. The City's affirmative action plan was passed after the California Fair Employment Practices Commission conducted an investigation of the City's employment practices and determined that minorities were conspicuously lacking in the City's work force. The FEPC's 1973 report found that while the City's population was approximately 30 percent minority, only 11.4 percent of the municipal work force was minority. Similarly, while approximately 17 percent of the population was black, only 7.3 percent of the municipal work force was black. The report also found that blacks earned considerably less money than whites. In addition, the FEPC report criticized the City for employing personnel practices that facilitate discrimination.

The record also shows a racial imbalance within the City fire department. The first black fire department employee was not hired until 1964. Between 1964 and the issuance of the FEPC report in 1973, only two other blacks received jobs with the fire department. Between 1972 and December 1983, forty-seven firefighters were hired, of whom only five were black. In that period, thirty-six individuals were promoted to fire captain; only one of those individuals was black. In the history of the fire department, only three blacks, one of whom was Cooley, have ever held the position of firefighter/engineer.

[10] The available evidence further shows that the affirmative action plan was adopted as a result of the FEPC's investigation. For example, a September 22, 1972 memo from the City Manager to the City Counsel states:

> As Council will recall, the California Fair Employment Practices Commission is conducting an investigation of the City's hiring practices. I have directed [the City Attorney] to prepare a draft of an Affirmative Action Program which will comply with present Federal and State law . . . .

Similarly, in a letter written on October 6, 1972 that accompanied the proposed affirmative action ordinance, the City Attorney wrote:

> The attached ordinance establishing an Affirmative Action Employment Program is submitted for your consideration. Its purpose is to bring the City of Vallejo into compliance with the requirements of the Federal Civil Rights Law of 1964 as amended in March 1972.
>
> . . .
>
> As Council knows the urgency for Vallejo to adopt a meaningful Affirmative Action Program is based

> on the present FEPC investigation. If such a program is not adopted in the very near future many of our federally funded programs may be in jeopardy. The City might find itself involved in lawsuits which could be costly not only in terms of staff time and money, but in good community relations as well.

[11] In the light of this evidence, we conclude that *Johnson*'s requirement that the affirmative action plan be responsive to a manifest imbalance in the workforce is satisfied.

B. *Effects on Non-Minorities*

[12] The second issue addressed by the Supreme Court in *Johnson* is whether the effect of Santa Clara County's affirmative action plan "on males and non-minorities is comparable to the effect of the plan in [*Weber*]." *Johnson*, 107 S. Ct. at 1452. Employing language from *Weber*, the Court restated this issue as "whether the Agency Plan unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement." *Id.* at 1455.

[13] In support of its conclusion that the County of Santa Clara's affirmative action plan was no more disadvantageous to males and non-minorities than that in *Weber*, the Court cited several factors. First, the plan established no quotas. The plan "merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants." The court stated that the Santa Clara County affirmative action plan was akin to the "Harvard Plan" approved by Justice Powell in *University of California Regents v. Bakke*, 438 U.S. 265, 316-19 (1978), which allows race to be considered as a factor in establishing diversity. As in *Bakke*, the court stated, "*No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants." *Johnson*, 107 S. Ct. at 1455 (emphasis in original). The affirmative

action plan established by the City of Vallejo is similarly free of rigid quotas and discriminatory exclusions. Only qualified employees are considered for promotions, and all applicants are entitled to compete against all others. Once the pool of qualified applicants is assembled, the City may take race into account in rendering its final decision.

[14] The second factor the Court cited in concluding that Santa Clara County's affirmative action plan had a sufficiently limited effect on males was that Paul Johnson, the plaintiff, "had no absolute entitlement to the road dispatcher position" because the Agency Director was authorized to grant the promotion to any of the seven qualified applicants. *Id.* Thus, the County's decision to hire Joyce uprooted no "legitimate firmly rooted expectation" on the part of Johnson. *Id.* Similarly, in this case plaintiff Higgins had no absolute entitlement to the position of firefighter/engineer because the city manager had discretion to choose among the top three applicants. Those top three applicants each had some hope of promotion, but none had a legitimate expectation of promotion.

[15] The third relevant factor discussed by the Court in *Johnson* was that, while being denied a discrete promotion, plaintiff Johnson retained his job, his salary, his seniority, and his eligibility for future promotions. *Id.* at 1455-56. In this case, too, plaintiff retained his job as firefighter, his salary, and his seniority. He also retained his eligibility for future promotions, as indicated by the fact that he was promoted to firefighter/engineer in February 1986.

[16] The final factor the Supreme Court considered regarding the effect of the Santa Clara County plan was the fact that it "was intended to *attain* a balanced work force, not to maintain one." *Id.* at 1456 (emphasis in original). Higgins contends that because the plan in this case fixes no deadline for achieving racial parity, the plan is not sufficiently temporary under *Weber*. However, in *Johnson*, the Supreme Court

stated that an express assurance that a program is temporary is unnecessary when the employer "has sought to take a moderate, gradual approach to eliminating the imbalance in its work force, one which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees." *Id.* We hold that the City of Vallejo has provided ample evidence that its affirmative action plan is a temporary program designed to attain racial balance. The affirmative action plan states that "it is the City's intention to *accomplish* this goal of equal employment opportunity." (Emphasis added). The City's plan provides for consideration of race only insofar as the merit principle can be preserved, making it a moderate and gradual remedy. The plan minimizes the disruption of employees' expectations by providing clear guidelines for when race may be taken into account. We conclude that the City's affirmative action plan is sufficiently temporary under *Weber* and *Johnson*.

[17] We hold that, like the County of Santa Clara's affirmative action plan in *Johnson*, the City of Vallejo's affirmative action plan is in full conformity with Title VII.

III. *Equal Protection*

[18] Higgins contends that the promotion of Cooley violates the equal protection clause of the fourteenth amendment to the United States Constitution. We hold that the promotion, made pursuant to the City's affirmative action plan, satisfies even the most rigorous equal protection requirements.

[19] The Supreme Court has consistently recognized that "government bodies constitutionally may adopt racial classifications as a remedy for past discrimination." *Local 28 of Sheet Metal Workers Int'l Ass'n v. Equal Employment Opportunity Commission*, 106 S. Ct. 3019, 3052 (1986) (plurality opinion). However, as Justice Brennan stated for the plurality

in *Sheet Metal Workers*, the members of the Court have not agreed on the appropriate test to be applied in analyzing whether a race-conscious remedial measure is constitutional. *Id.* In that case, however, the plurality held that the affirmative action plan in question "passes even the most rigorous test—it is narrowly tailored to further the Government's compelling interest in remedying past discrimination." 106 S. Ct. at 3053. We need venture no view on the appropriate standard to be applied in this case because we hold that the City's plan also passes the most rigorous test for equal protection as set forth in *Sheet Metal Workers*.

[20] Under this "least common denominator" strict scrutiny standard, a government agency's affirmative action plan is valid only if the agency had a compelling interest in remedying past discrimination. This requirement is not satisfied by a general showing of societal discrimination. Rather, the Supreme Court has required a showing of prior discrimination by the governmental unit whose affirmative action plan is under scrutiny. *Wygant v. Jackson Board of Educ.*, 106 S. Ct. 1842, 1847 (1986). As indicated in our discussion of Title VII, the record provides abundant evidence that the City of Vallejo engaged in past discrimination. The state's FEPC report indicates that the City's municipal workforce suffered a serious racial imbalance and that this imbalance was caused, at least in part, by the City's employment practices. The report also contained implied threats of legal action by the FEPC if the City did not take affirmative steps to remedy the racial imbalance.

[21] The City's plan is narrowly tailored to achieve racial balance. The plan does not force the city manager to promote individuals solely because of their race. Under the plan, after taking a competitive examination, the top three qualified applicants are ranked according to their numerical test scores. The plan then allows the city manager to consider race as one of any number of factors when deciding whom to appoint among the three certified applicants.

The City's plan is similar to the "Harvard Plan" for university admissions that Justice Powell approved in *University of California Regents v. Bakke*, 438 U.S. 265, 316-19 (1979). Under the Harvard Plan, "[w]hen the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor." *Id.* at 316. Justice Powell noted that:

> In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. . . . In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. . . .
>
> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. . . . His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Id. at 317-18.

As the district court noted, the City has accorded race the same role as accorded by the Harvard admissions process. In City promotion decisions, all candidates compete on equal

footing. The top three candidates, selected through a merit-based process, are all deemed qualified for promotion. The system then invests discretion in the City Manager to choose among these three, allowing him to use various factors, including race, in making his decision. This "plus" system accords each applicant the equal treatment contemplated by the "Harvard Plan."

[22] Significantly, Vallejo's plan does not use layoffs to achieve its goals. In *Wygant*, the Supreme Court indicated that layoffs are a disfavored means of achieving racial balance. *Wygant*, 106 S. Ct. at 1851. In that case, the Jackson, Michigan board of education amended its collective bargaining agreement with its teachers' union in such a way that it required layoffs of tenured nonminority teachers before layoffs of untenured minority teachers. When layoffs became necessary, this practice was followed. The displaced nonminority teachers brought suit alleging an equal protection violation.

The Court in *Wygant* noted that "[w]e have recognized . . . that in order to remedy the effects of prior discrimination, it may be necessary to take race into account," *id.* at 1850, but then concluded that the school board's layoff approach was too intrusive a means of limiting discrimination. In *Wygant*, the Court discussed at length the peculiar harm inherent in the use of layoffs to remedy prior discrimination. Citing *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which held that Congress' allocation of ten percent of its public works contracts to minority business enterprises is constitutionally permissible, the Court stated that Congress' action in that case was appropriate in part because it imposed a relatively light burden on nonminorities. *Wygant*, 106 S. Ct. at 1850-51 (citing *Fullilove*, 448 U.S. at 484). The Court stated:

> Significantly, none of the cases discussed above [including *Fullilove*] involved layoffs . . . . We have previously expressed concern over the burden that a

> preferential layoffs scheme imposes on innocent parties .... In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.
>
> ...
>
> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.

Id. at 1851-52 (emphasis in original).

[23] The City's plan concerning the promotion of qualified minority employees is a minimally intrusive means to achieve racial balance and is thus a narrowly tailored remedy. These promotion guidelines are even less intrusive than hiring goals. Like hiring goals, promotion guidelines visit a minor burden on nonminority employees. But unlike hiring goals, promotion guidelines do not require that an individual bear the burden of past discrimination to the extent that he or she is denied a livelihood. All of the City's employees who are

denied promotion retain their existing jobs, salary, and seniority. The affirmative action plan merely allows race to be considered as among employees who are otherwise fully qualified for the promotion. Because the plan is narrowly tailored to further the City's compelling interest in remedying past discrimination, we conclude that the hiring of Cooley under the plan does not violate the equal protection clause.

We AFFIRM the district court's order of summary judgment for defendants on all claims.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK HIGGINS, Plaintiff-Appellant, vs. CITY OF VALLEJO, Defendant-Appellee.	)	No. 86-1904 O R D E R (Sept. 28, 1987)

Before: CHOY, PREGERSON, and CANBY, Circuit Judges.

The panel as constituted above voted to deny the petition for rehearing. Judges Pregerson and Canby voted to reject the suggestion for rehearing en banc and Judge Choy recommends such rejection.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

CHARTER OF THE CITY OF VALLEJO

Article VIII
Personnel Administration and Civil Service

Section 800 Appointments and Promotions.

All appointments and promotions in the competitive civil service shall be based on ability and experience as determined by tests and records of achievement, subject to such more specific standards as set forth in personnel rules as adopted under provisions of Section 803 of this Charter.

CHARTER OF THE CITY OF VALLEJO

Article VIII
Personnel Administration and Civil Service

Section 803 Personnel Ordinance.

The City Council shall by ordinance provide a modern system of personnel administration, including but not necessarily limited to provisions for:

a. an orderly system of positive recruiting and competitive examinations for entrance to the civil service, free of all political, religious, racial and other considerations not consistent with the merit principle, and properly advertised;

b. a system for promotions within the service based on competitive examinations or demonstrated merit as shown by records of performance and seniority, or some combination thereof;

ORDINANCE No. 138 N.C. (2d)

AN ORDINANCE OF THE CITY OF VALLEJO ESTABLISHING AN AFFIRMATIVE ACTION POLICY FOR CITY EMPLOYMENT; PROVIDING A SEVERABILITY CLAUSE; REPEALING ALL ORDINANCES OR PARTS OF ORDINANCES IN CONFLICT OR INCONSISTENT WITH THE PROVISIONS OF THIS ORDINANCE; AND SETTING AN EFFECTIVE DATE.

THE COUNCIL OF THE CITY OF VALLEJO DOES ORDAIN AS FOLLOWS:

SECTION 1: FINDINGS AND DECLARATIONS

A. The Council of the City of Vallejo finds that there are intensified efforts being made under both State (Fair Employment Practices Act - Part 4.5 [Section 1410, et sequitur], Division 2 of the Labor Code of the State of California) and Federal (Equal Employment Opportunity Act of 1972 - Public Law 92-261; 86 Stat. 103) laws to promote and realize equal employment opportunity in the State of California and in the United States, and the City of Vallejo desires to participate in this endeavor.

B. The Council of the City of Vallejo declares its intention to accomplish this goal of equal employment opportunity within the framework of the City Charter which requires an orderly system of positive recruiting and competitive examinations for entrance to the Civil Service of the City of Vallejo, and for advancement and promotion in said Civil Service System based upon competitive examinations or demonstrated merit as shown by records of performance and seniority or some combination thereof, free of all political, religious, racial and other considerations not consistent with the merit principle.

C. The Council of the City of Vallejo declares its determination to promote and realize equal employment opportunity within the City of Vallejo as above outlined, and yet said Council is equally determined to preserve the high

quality of service rendered and to be rendered by municipal employees to the citizens of the City of Vallejo.

SECTION 2. ADOPTION OF AFFIRMATIVE ACTION POLICY

The Council of the City of Vallejo does hereby formally adopt an Affirmative Action Policy for City Employment and will promote and undertake activities as outlined hereinafter in this Ordinance to implement said policy for the City of Vallejo, its departments, divisions of departments, offices and agencies operating under the City Charter, to the end that employment with the City of Vallejo at the various levels of compensation and in the various job classifications will be consistent with the ethnic composition of the City of Vallejo, and consistent with the

availability of women in the labor market of the City of Vallejo.

SECTION 3. DEFINITIONS

As used in this Ordinance, the following definitions apply:

"Affirmative Action Employment Program" means a program that will have its goal the improvement of hiring and promotional policies so as to bring an equitable proportion of minority citizens into City employment. Said program shall be open to minority group members, whether or not employed by the City upon adoption of this Ordinance.

"Affirmative Action Advisory Committee" means the Affirmative Action Advisory Committee of the City of Vallejo.

"Affirmative Action Officer" means the Affirmative Action Officer of the City of Vallejo appointed by the City Manager.

"City" means the City of Vallejo.

"City Council" means the City Council of the City of Vallejo.

"City Manager" means the City Manager of the City of Vallejo.

"Civil Service Commission" means the Civil Service Commission of the City of Vallejo.

"Department Head" means that person appointed to administer and direct the operation of a department, or a major division of a department, an office, or an agency of the City of Vallejo, in the manner prescribed by the City Charter, or by ordinance adopted thereunder by the City Council.

"Minority" or "Minorities" means Blacks, Mexican-Americans, American Indians, Filipinos, and persons of Asian ancestry; each term also includes women.

"Personnel Officer" means the Personnel Officer of the City of Vallejo.

SECTION 4. AFFIRMATIVE ACTION ADVISORY COMMITTEE

There is hereby created an Affirmative Action Advisory Committee, the membership of which shall consist of seven (7) persons who are residents of the City of Vallejo over the age of eighteen (18) years, appointed by the City Council as follows:

1 Police Association Representative

1 Firefighters' Union Representative

1 Miscellaneous Employees Union Representative

1 Black Representative

1 Mexican American Representative

1 Filipino Representative

1 Female Representative

The members shall elect a chairman and vice chairman and other offices as the Committee deems appropriate. It is recommended that minority Committee members be selected from the major ethnic

organizations. The terms of office of each Committee member shall be three (3) years, staggered so that the continuity of the Committee may be preserved. Upon its initial organization, the Committee members shall draw lots to determine who shall serve one, two and three years. Thereafter, each term shall be for a full three (3) years. The Committee may adopt rules of procedure for the conduct of its meetings and shall fix the time and place of its regular meetings. The Committee shall be advisory to the Civil Service Commission and shall receive such staff assistance as is necessary to facilitate its operations.

SECTION 5. DUTIES AND RESPONSIBILITIES FOR IMPLEMENTATION OF AFFIRMATIVE ACTION POLICY.

A. The Affirmative Action Advisory Committee shall:

1. Assist in monitoring the progress of the Affirmative Action Employment Program on a continuing basis.

2. Review and evaluate all affirmative action employment plans of departments, divisions of departments, offices, and agencies of the City of Vallejo, and make recommendations for strengthening such plans and programs where necessary.

3. Make recommendations to the Civil Service Commission to improve the Affirmative Action Employment Program where appropriate, and act as advocates of the Program.

B. The City Manager shall:

1. Be responsible for the administration of the Affirmative Action Employment Program as it

relates to the employment, training, and promotion of minorities.

2. Establish and intensify efforts to recruit, select, qualify, and promote minority candidates for employment with the City in all classified and unclassified positions.

3. Establish, administer and provide policy direction for the Affirmative Action Employment Program, to the end that equal employment opportunity will truly exist in each department, division of departments, office and agency of the City in the classification and positions thereof.

4. Establish programs of training to facilitate career advancement which will include, but not be limited to, apprenticeship and other entry level training

programs.

5. Select and appoint an Affirmative Action Officer who will plan and coordinate the implementation of the Affirmative Action Employment Program.

C. Department Heads shall:

1. Commit themselves positively to the principles and objectives of the Affirmative Action Employment Program.

2. Develop within their respective departments, divisions, offices, or agencies of the City and affirmative action plan for review and comment within ninety (90) days after adoption of this ordinance by the City Council.

3. Take full responsibility for the successful implementation of the Affirmative Action Employment Program within their respective

departments, divisions, offices or agencies.

4. Establish and implement, with the approval of the City Manager, training, apprenticeship and job promotion programs within their respective departments, divisions, offices or agencies, which will aid in the improving of skills and preparing minorities for job promotional opportunities as they may arise.

D. The Personnel Officer shall:

1. In conjunction with the Affirmative Action Officer, establish special recruitment programs, and where possible conduct recruitment and orientation concerning City employment in areas populated by minorities.

2. Develop regular communi-

cation channels with minority group neighborhoods to insure that information regarding employment opportunities with the City is widely disseminated.

3. Analyze the testing procedures and all other aspects of recruitent and the certification processes so that artificial barriers to employment and promotion are eliminated, and insure that written tests are not required where job performance tests will suffice.

4. Develop special recruitment technique with flexibility allowing for decentralization and the holding of examinations in areas populated by minorities where ever feasible.

5. Accomplish each of the above tasks with the consent and under the direction of the Civil

Service Commission where such is required by the Personnel Ordinance, and Rules and Regulations adopted thereunder and pertaining thereto.

E. The Affirmative Action Officer shall:

1. Assist each department head in preparation of his respective affirmative action plan, and periodically review them to insure that policy goals are being met.

2. Assist the City Manager by making known to the department heads, and subordinate supervisors and to minority groups the goals of the Affirmative Action Employment Program, and the interpretation of policies and procedures thereunder.

3. Provide counselling and encouragement to minority employees

concerning opportunities for promotion within the City service.

4. Improve the understanding of minority group cultures and create a positive atmosphere toward the employment of minorities among department heads, and their subordinate supervisors, and the employees under their charges by conducting special orientation sessions, and providing emphasis upon the importance and high priority to be given the Affirmative Action Employment Program.

5. Establish, when necessary to successfully implement the Affirmative Action Employment Program, informal grievance procedures.

6. Under the direction of the City Manager, utilize available local and other funds for the

establishment of training and promotional programs for minorities.

7. Assist in the establishment of training and encourage minorities to utilize training, to upgrade their qualifications by special education, so as to be able to secure professional and technical positions.

8. Develop an exit interview technique to gather information concerning the resignation, discharge, lay-off or other termination of minorities from employment with the City for the purpose of improving the quality of employees and candidates for employment.

9. In instances where appropriate, attempt to reconcile deficiencies or differences that exist between department heads,

their subordinate supervisors, and affected employees when persons who have been hired as a result of efforts made under the Affirmative Action Employment Program are declared incapable of holding or unsuited for the positions for which hired.

10. In consultation with the Affirmative Action Advisory Committee, review the Program on a semi-annual basis.

SECTION 6. EMPLOYMENT PRACTICES

A. Job announcements and prospectuses of the City shall be prepared in such a manner that all unnecessary qualifications and requirements for the position which is open are eliminated. The Personnel Officer of the City will reevaluate all future job announcements and prospectuses

and insure that they contain no qualifications or requirements that are not actually necessary for the performance of the work of the job or position which is sought to be filled.

B. Background investigations or reference checks of applicants for employment with the City shall be made by the Personnel Officer.

C. Employment interview panels shall contain minority and/or female representation and at least two persons who have knowledge or previous work experience in the job for which applicants are being interviewed. Each interview panel shall be carefully counselled by the Personnel Officer, or his designated representative, who shall insure that no questions are or will be asked which are in violation of any of the provisions of this Ordinance or applicable state or federal laws

pertaining to equal employment opportunity. No interview panel shall have as a member any person from the department, a division of a department, office, or agency of the City to which the job or position is to be assigned.

D. The Civil Service Commission shall adopt new and consistent rules and regulations for recruitment, hiring and promotion within City employment to implement the Affirmative Action Employment Program, and to bring the City's employment practices into compliance with applicable state and federal laws on the subject.

SECTION 7. UPWARD MOBILITY

A career ladder shall be established which will provide counselling, training and encouragement for employees to take advantage of promotional opportunities within the City employment structure. In

furtherance of this objective:

A. Counselling shall be the duty of the Affirmative Action Officer, as well as the department heads and their supervisors.

B. Training shall include the vocational testing and evaluation of each employee. An appropriate course of training should be developed for training within the department where the employee is working to prepare him for appropriate advancements as they occur.

C. Each department head, supervisor in a department, and the Affirmative Action Officer shall encourage employees to prepare for promotional opportunities and apply for positions as they become available.

SECTION 8. APPRENTICESHIP PROGRAM

An Apprenticeship Program shall be instituted under the direction of the

City Manager with the concurrence of the Civil Service Commission, which will have as its goal the utilization of enrollees to bring more capable and highly qualified employees into City employment.

To accomplish these goals, a position and classification study will be made to establish the requirements of each position to be utilized in the apprenticeship program. Each department involved shall institute training programs which will be approved by the Affirmative Action Officer.

The length of each apprenticeship enrollment shall normally be eighteen (18) months. If the enrollee is not hired by the department by the end of that period of time his apprenticeship shall be terminated. No enrollee shall be retained longer than eighteen (18) months, without the written approval of the City Manager. In no event shall an

enrollee be retained for longer than twenty-four (24) months.

The types of apprenticeship positions shall include, but not be limited to, the following:

1. Apprentice Policeman
2. Apprentice Fireman
3. Apprentice Equipment Operator
4. Apprentice Equipment Repairman

SECTION 9. TIMETABLE FOR IMPLEMENTATION

It is the intention of the City Council that within five (5) years from the date of adoption of this Ordinance, the Affirmative Action Employment Program established herein shall be implemented to the full extent.

In establishing this timetable for implementation, the City Council recognizes the fact that vacancies in administrative, technical, supervisory, and professional positions are

infrequent. This does not preclude the possibility of earlier implementation, if such is attainable. Recognizing this limitation, maximum efforts will be made to insure that minority employees qualified for advancement or promotions to vacant jobs or positions have been qualified in accordance with objectives set forth in this Affirmative Action Policy. All jobs or positions becoming vacant after the adoption of this Affirmative Action Policy shall be subject to the provisions contained herein, and for vacancies, including those already announced, the period of recruitment may be extended by the Civil Service Commission, upon request of the City Manager, if he determines that such action is necessary to promote the implementation of said Program.

SECTION 10. SEVERABILITY OF PROVISIONS

If any section, subsection, subdivision, sentence, clause, phrase or portion of this Ordinance, or the application thereof to any person, is for any reason held to be invalid or unconstitutional by the decision of any Court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance, or its application to other persons. The City Council hereby declares that it would have adopted this Ordinance, and each section, subsection, subdivision, sentence, clause, phrase or portion thereof irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, phrases or portions, or the application thereof to any person, be declared invalid or unconstitutional.

SECTION 11. REPEAL OF CONFLICTING ORDINANCES

All ordinances, or parts of ordinances, in conflict with or inconsistent with the provisions of this Ordinance are hereby repealed.

SECTION 12. EFFECTIVE DATE

This Ordinance shall take effect, and be in full force and effect, from and after thirty (30) days after its final passage.

First read at a regular meeting of the Council of the City of Vallejo held on the 20 day of February, 1973 and finally passed and adopted at a regular meeting of the Council held on the 26th

day of February, 1973, by the following vote:

AYES: Councilmen Cunningham, Dittman, Douglas, Dubnoff, Krull and Lavezzo.

NOES: Councilman Curtola.

ABSENT: None.

/s/
FLORENCE E. DOUGLAS, Mayor

Attest: /s/
HELEN G. SEEBER, City Clerk

ORDINANCE No. 667 N.C. (2d)

AN ORDINANCE OF THE CITY OF VALLEJO REPEALING ORDINANCE NO. 138 N.C. (2d), AS AMENDED, AND CHAPTER 2.74 OF THE VALLEJO MUNICIPAL CODE, AND ENACTING, ADOPTING AND ADDING TO THE VALLEJO MUNICIPAL CODE A NEW CHAPTER 2.74 PERTAINING TO THE AFFIRMATIVE ACTION EMPLOYMENT POLICY FOR THE CITY OF VALLEJO.

THE COUNCIL OF THE CITY OF VALLEJO DOES ORDAIN AS FOLLOWS:

SECTION 1: Ordinance No. 138 N.C. (2d), as amended, and Chapter 2.74 of the Vallejo Municipal Code are hereby repealed.

SECTION 2. The entire provisions of Exhibit "A", attached hereto and incorporated herein by this reference, are hereby adopted.

SECTION 3. This Ordinance shall take effect and shall be in full force and effect thirty (30) days from and after its final passagfe.

This Ordinance was first read on September 27, 1982 and finally adopted at a regular meeting of the Council of the City of Vallejo on October 4, 1982, by the following Vote:

AYES: Councilmembers Berry, Curtola, Intintoli, Keith, Kondylis and Sibley

NOES: None

ABSENT: Councilmember Hodge, excused

/s/
TERRY A. CURTOLA, Mayor

Attest: /s/
MILDRED R. WATSON, City Clerk

EXHIBIT A

CHAPTER 2.74

AFFIRMATIVE ACTION EMPLOYMENT POLICY

Sections:

2.74.010 Findings and Declarations.
2.74.020 Adoption.
2.74.030 Definitions.
2.74.040 Implementation -- City Manager Duties and Responsibilities.
2.74.050 Implementation -- Duties of Department Heads.
2.74.060 Implementation -- Director of Personnel and Labor Relations Duties.
2.74.070 Implementation -- Affirmative Action Officer Duties.
2.74.080 Implementation -- Human Relations Committee Duties.
2.74.090 Employment Practices.
2.74.100 Promotional Opportunities.
2.74.110 Timetable for Implementation.

2.74.010 Findings and Declarations.

A. The Council of the City of Vallejo finds that there are intensified efforts being made under both state (Fair Employment Practices Act -- Part 4.5 (Section 1410, et sequitur), Division 2 of the Labor Code of the State of California) and federal (Equal Employment Opportunity Act of 1972 -- Public Law 92-261; 86 Stat. 103) laws to promote and realize equal employment opportunity in the State of California and in the United States, and the City of Vallejo desires to continue to participate in this endeavor.

B. The Council of the City of Vallejo continues to declare its intention to accomplish this goal of equal employment opportunity within the framework of the City Charter which

requires an orderly system of positive recruiting and competitive examinations for entrance to the civil service of the City of Vallejo, and for advancements and promotion in the civil service system based upon competitive examinations or demonstrated merit as shown by records of performance and seniority or some combination thereof, free of all political, religious, racial and other considerations not consistent with the merit principle.

C. The Council of the City of Vallejo reaffirms its determination to promote and realize equal employment opportunity within the City of Vallejo as above outlined, and yet the Council is equally determined to preserve the high quality of service rendered and to be rendered by

municipal employees to the citizens of the City of Vallejo.

2.74.020 Adoption.

The Council of the City of Vallejo formally adopts an affirmative action policy for city employment and will promote and undertake activities as outlined hereinafter in this chapter to implement said policy for the City of Vallejo, its departments, divisions of departments, offices and agencies operating under the City Charter, to the end that employment with the city at the various levels of compensation and in the various classifications will be consistent with the racial and ethnic composition of the city, and consistent with the availability of women in the labor market of the city.

2.74.030 Definitions.

As used in this chapter, the following definitions apply:

A. "Affirmative Action Employment Program" means a program that will have its goal the improvement of hiring and promotional policies so as to accomplish the goals of affirmative action of the City;

B. "City" means the City of Vallejo.

C. City Council" means the City Council of the City of Vallejo.

D. "Civil Service Commission" means the Civil Service Commission of the City of Vallejo.

E. "Department Head" means that person appointed to administer and direct the operation of a department, or a major division of a department, an office, or an agency of the city, in the manner prescribed by the City Charter, or by ordinance adopted thereunder by the City Council;

F. "Minority Group or Minorities" means Black, Hispanic, Asian, Native

American, Filipino. Women, Handicapped, and other groups identified in Title VII of the Civil Rights Act of 1964 are also covered by this policy.

G. "Community Relations Committee" means the five community members of the Community Relations Committee appointed by the City Council.

2.74.040 Implementation -- City Manager Duties and Responsibilities.

The City Manager shall:

A. Be responsible for the administration of the Affirmative Action Employment Program as it relates to the employment, training, and promotion of minorities;

B. Establish and intensify efforts to recruit, select, qualify, and promote minority group candidates for employment with

the city in all classified and unclassified positions;

C. Establish, administer and provide policy direction for the Affirmative Action Employment Program, to the end that equal employment opportunity will truly exist in each department, division of departments, office and agency of the city in the classifications thereof;

D. Establish programs of training to facilitate career advancement which may include, but not be limited to, apprenticeship and other entry level training programs;

E. Select and appoint an Affirmative Action Officer.

2.74.050 Implementation -- Duties of Department Heads.

Department Heads shall:

A. Commit themselves positively to the principles and objectives of the Affirmative Action Employment Program;

B. Take full responsibility for the successful implementation of the Affirmative Action Employment Program within their respective departments, divisions, offices or agencies;

2.74.060 Implementation -- Director of Personnel and Labor Relations Duties.

The Director of Personnel and Labor Relations shall:

A. Establish special recruitment programs targeted toward racial and ethnic minorities, women, and handicapped.

B. Develop regular communication channels with racial or ethnic

minority and women's groups to insure that information regarding employment opportunities with the city is widely disseminated;

C. Analyze the testing procedures and all other aspects of recruitment and the certification processes so that artificial barriers to employment and promotion are eliminated, and insure that written tests are not required where other tests will suffice;

D. Accomplish each of the above tasks with the consent and under the direction of the Civil Service Commission where such is required by the personnel ordinance, and rules and regulations adopted thereunder and pertaining

thereto.

2.74.070 Implementation -- Affirmative Action Officer Duties.

The Affirmative Action Officer shall:

A. Assist each department head in implementing the Affirmative Action Employment Plan.

B. Assist the City Manager by making known to the department heads, and subordinate supervisors and to minorities the goals of the Affirmative Action Employment Program, and the interpretation of policies and procedures thereunder;

C. Provide counselling and encouragement primarily to minority, female and handicapped employees concerning opportunity for promotion within the city service;

D. Improve the understanding of racial or ethnic minorities and women's groups and create a positive atmosphere toward the employment of these groups among department heads, and their subordinate supervisors, and the employees under their charge by conducting special orientation sessions, and providing emphasis upon the importance and high priority to be given the Affirmative Action Employment Program;

E. Establish, when necessary to successfully implement the Affirmative Action Employment Program, a counselling program designed specifically for applicants or potential applicants of the minority group;

F. Under direction of the City Manager, utilize available local and other funds for the establishment of training and promotional programs for the minority group;

G. Develop an exit interview technique to gather information concerning the resignation, discharge, lay-off or other termination of minorities from employment with the city for the purpose of improving the quality of employees and candidates for employment;

H. In instances where appropriate, attempt to reconcile deficiencies or differences that exist between department heads, their subordinate supervisors, and affected employees when persons who have

been hired as a result of efforts made under the Affirmative Action Employment Program are declared incapable of holding or unsuited for the positions for which hired;

I. In consultation with the Community Relations Committee, review the achievements of the program on a semi-annual basis.

J. The Affirmative Action Officer shall have full access to all departmental policies and procedures, rules and regulations including personnel files, documents, background investigation reports, and any other documents or information relating to the employment, training, promotion, transfer, termination or discipline of personnel in the City of

Vallejo.

2.74.080 Implementation -- Community Relations Committee Duties.

The Community Relations Committee of the City of Vallejo shall:

A. Assist in monitoring the progress of the Affirmative Action Employment Program on a continuing basis.

B. Review and evaluate all Affirmative Action Employment Plans of the city, and make recommendations for strengthening such plans and programs where necessary.

C. Make recommendations to the Civil Service Commission to improve the Affirmative Action Employment Program where appropriate, and act as advocates of the program.

D. Be advisory to the Civil Service Commission, the City Council and the City Manager.

2.74.090 Employment Practices.

A. Classification specifications and examination plans of the city shall be developed such that all unnecessary qualifications and requirements are eliminated.

B. Background investigations or reference checks of applicants for employment with the city shall be made by the Director of Personnel and Labor Relations and his/her designated representative.

C. Every effort will be made to assure that the qualification appraisal panels, used to develop Lists of Eligibles, shall contain at least one

minority and persons who have knowledge or previous work experience in the job for which applicants are being interviewed.

D. The Civil Service Commission shall adopt new and consistent rules and regulations for recruitment, hiring and promotion within city employment to implement the Affirmative Action Employment Program, and to bring the city's employment practices into compliance with applicable state and federal laws on the subject.

2.74.100 Promotional Opportunities.

Career ladders shall be established which will provide encouragement for employees to take advantage of promotional opportunity within city

employment structure. In furtherance of this objective:

A. Counselling shall be the duty of the Affirmative Action Officer, as well as the department heads and their supervisors.

B. Training shall be made available where possible and shall include vocational testing and evaluation.

C. Each department head, supervisor in a department, and the Affirmative Action Officer shall encourage employees to prepare for promotional opportunity and apply for positions as they become available.

2.74.110 Timetable for Implementation.

A. It is in the intention of the City Council that the

Affirmative Action Employment Program established herein shall be implemented to the full extent as soon as possible.

B. The City Council recognizes the fact that vacancies in administrative, technical, supervisory, and professional positions are infrequent. Recognizing this limitation, maximum efforts will be made to insure that members of the minority group of employees qualified for advancement or promotion to vacant positions have been qualified in accordance with objectives set forth in this Affirmative Action Policy. All positions becoming vacant after the adoption of this Affirmative Action Employment Policy shall

be subject to the provisions contained herein, and for vacancies, including those already announced, the period of recruitment may be extended by the Civil Service Commission, upon request of the City Manager, if he determines that such action is necessary to promote the implementation of said program.